DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury of all issues of fact in this case.

Dated this 23rd day of December, 2005.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiffs, vs. MERCK & CO., INC., Defendant.	**COMPLAINT AND JURY DEMAND** **Civil No.** 060907140 **Judge** KOURIS

Plaintiff, the State of Utah (hereinafter "Plaintiff" or "the State"), by and through its Attorney General Mark L. Shurtleff, hereby complains of Defendant Merck & Co., Inc., (hereinafter "Defendant" or "Merck") and alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the subject matter of this cause of action is based upon the False Claims Act, Title 26, Chapter 20 of the Utah Health Code, which provides remedies to redress Defendant's actions under Utah Code Annotated § 26-20-1 et seq.

2. Personal jurisdiction over this Defendant is proper under the Utah Long Arm Statute as codified in §§ 78-27-22 and 78-27-24 of the Utah Code Annotated.

3. Venue is proper in the Third Judicial District and Salt Lake County pursuant to Utah Code Annotated § 78-13-7 in that many of the unlawful acts committed by Defendant were committed in Salt Lake County, including the making of false statements and misrepresentations of material fact to the State of Utah, its departments, agencies, instrumentalities and contractors, including the Utah Medicaid Program.

PARTIES

4. Plaintiff is the State of Utah in its capacity as sovereign and on behalf of the Division of Health Care Financing within the Utah Department of Health, the single state agency administering the Utah Medicaid Program.

5. Defendant Merck is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Whitehouse Station, New Jersey. At all times relevant to this action, Merck was in the business of licensing, manufacturing, distributing, and/or selling, either directly or indirectly, through third parties or related entities, the prescription pharmaceutical Vioxx (hereinafter "the product" or "Vioxx"). At all times relevant to this action, Merck did business within the State of Utah by marketing and selling Vioxx within the State to both the State and its agencies and to the general public.

NATURE OF THE CASE

6. This is a civil action for damages and civil penalties pursuant to Utah Code Annotated § 26-20-13.

ALLEGATIONS OF FACT

7. The Federal Food and Drug Administration (hereinafter "FDA") approved Vioxx on May 20, 1999, for the treatment of dysmenorrhea (painful menstrual cramps), management of acute pain in adults, and for relief of signs and symptoms of osteoarthritis. Subsequent to FDA approval, Vioxx was widely advertised and marketed by Merck as a safe and effective pain relief medication.

8. From the time Defendant started developing Vioxx, through the date of its withdrawal from the market on September 30, 2004, the Defendant engaged in knowing misrepresentations that Vioxx was safe and effective, as well as advertising and promotional campaigns that falsely represented the safety of Vioxx.

9. Defendant was aware of the serious and significant health hazards caused by Vioxx even before the medication was promoted to physicians, the State and the general public. Specifically, Defendant knew that cerebrovascular and cardiovascular problems occurred more frequently in patients receiving Vioxx than in patients receiving placebos or other medicines. Defendant's internal memos and e-mails dating back to at least 1996 show that the Defendant knew how and why Vioxx caused cardiovascular problems in Vioxx patients, as compared to a control group. This information was knowingly withheld or misrepresented to the FDA, the State and the general public. This information was material and relevant to Plaintiffs.

10. According to Merck, more than 52 million prescriptions have been written for Vioxx since 1999. Vioxx generated sales of 2.6 billion dollars in 2001 out of an anti-arthritic market of 5.5 billion dollars.

11. After Vioxx was approved and made available to the public, Merck sponsored the VIGOR (Vioxx Gastrointestinal Outcomes Research) study to obtain information regarding clinically meaningful gastrointestinal events and to develop a large controlled database for overall safety assessment. At the conclusion of the VIGOR study, it was reported that serious cardiovascular events occurred in 101 patients who took Vioxx, compared to 46 patients who took an over-the-counter alternative. Additionally, myocardial infarctions (heart attacks) occurred in 20 patients in the Vioxx treatment group, as opposed to only four in the alternative group.

12. In addition, Vioxx has been linked to several severe and life-threatening disorders including, but not limited to, edema, unsafe changes in blood pressure, heart attack, stroke, seizures, kidney and liver damage, pregnancy complications, meningitis and death. These dangers were not shared with physicians, the FDA, the State or the general public.

13. Beginning in the 1990s, Defendant's strategy was to aggressively market and sell Vioxx by willfully misleading potential users about serious dangers resulting from the use of Vioxx. Defendant undertook an advertising blitz, extolling the virtues of Vioxx in order to induce widespread use. This marketing campaign consisted of advertisements, telephone conferences, live conferences, direct promotional literature to doctors and other healthcare providers, and other promotional materials provided directly to Vioxx users.

14. The advertising program sought to create the impression and belief by consumers and physicians that Vioxx was safe for human use, and had fewer side effects and adverse reactions than other pain relief medications. This was done even though Defendant either knew these representations to be false or had no reasonable grounds to believe them to be true.

15. The advertising program purposefully downplayed the risks associated with Vioxx use, including serious illness and death. Merck relayed only positive information and relied upon manipulated statistics to suggest widespread acceptability, while at the same time concealing adverse factual material, including relevant information of serious health risks from the State, physicians and the general public. In particular, the advertising materials produced by Defendant falsely represented the severity, frequency and nature of adverse health effects caused by Vioxx. Further, they falsely represented that adequate testing had been done on Vioxx.

16. Merck's conduct was such that the FDA, which enforces federal statutes and regulations that require product safety disclosures to be truthful, fair and balanced, issued several informal warnings to Merck, requesting that accurate risk-related information be provided regarding Vioxx. These warnings went largely unheeded, prompting the FDA to write an official "warning letter" in September of 2001, demanding that Merck correct certain false and misleading claims.

17. As a result of Defendant's advertising and marketing efforts, Vioxx was pervasively prescribed throughout the United States and the State of Utah until September 30, 2004, when it was withdrawn from the market.

18. While making Vioxx available to Medicaid patients, Defendant knowingly misrepresented to the State, as well as to physicians and the general public that Vioxx was safe and efficacious. The State of Utah allowed the purchase of Vioxx for Utah Medicaid recipients based upon such representations by Defendant.

19. From May, 1999 until September 30, 2004, Vioxx was prescribed by Utah physicians to many recipients of the Medicaid Program of the State of Utah. As a result of ingesting Vioxx, Utah Medicaid patients suffered serious health effects now requiring further and more extensive medical treatment and provision of other health-related services. For these individuals, the State is the financially responsible party for this treatment. The State has thus suffered and will continue to suffer additional financial loss in the care of those Medicaid recipients who consumed prescriptions which were ineffective, unsafe and actively harmful.

20. The Utah Attorney General has the right to bring this suit pursuant to Utah Code Annotated §§ 26-20-13(2)(a), 67-5-1(2) and 67-5-3. Utah Code Annotated § 26-20-9.5(1)(b) further provides that the State of Utah is entitled to recover the costs of enforcement in this case, including but not limited to the cost of its investigators and attorneys.

FIRST CLAIM FOR RELIEF
(Strict Products Liability – Failure to Warn)

21. Plaintiff incorporates paragraphs 1 through 20 as if fully set forth herein, and further alleges as follows:

22. Defendant is the manufacturer and/or supplier of Vioxx.

23. The Vioxx manufactured and/or supplied by Defendant was unaccompanied by proper warnings or packaging regarding all possible side effects associated with the use of

Vioxx. The Defendant failed to warn of the comparative severity, incidence and duration of such adverse effects. The warnings given to the State, physicians and the general public did not accurately reflect the signs, symptoms, incidents or severity of the side effects of Vioxx.

24. Defendant failed to adequately test Vioxx. Such testing would have further confirmed that Vioxx possessed serious potential side effects to which full and proper warnings should have been made.

25. The Vioxx manufactured or supplied by Defendant was defective due to inadequate post-marketing warnings, packaging or instructions. After the manufacturer knew or should have known of the risks of injury from Vioxx, it failed to provide adequate warnings to physicians, the general public or the State as the prescribers, users and financially responsible party, respectively. Further, Defendant continued to aggressively market Vioxx.

26. As a proximate cause and legal result of Defendant's failure to warn of known and reasonably knowable dangers associated with the use of Vioxx, the State of Utah has suffered and will continue to suffer damages as outlined in paragraph 19 above. The State is therefore entitled to recover for those damages, as well as those outlined in paragraph 20.

27. Based on information and belief, Defendant actually knew of the defective nature of Vioxx, but continued to market and sell Vioxx without proper warning, so as to maximize sales and profits, in conscious disregard for the foreseeable harm caused by Vioxx.

28. Defendant's conduct in the advertising, marketing, promotion, packaging and distribution of Vioxx without proper and timely warnings was fraudulent and knowing or reckless misconduct, with conscious disregard for the safety of consumers and the State as the

financially responsible party. The same constitutes oppression, fraud and malice sufficient to entitle the State to an award of punitive damages in an amount sufficient to punish Defendant and set an example to all drug manufacturers who represent the safety of their product to the State for use in the Medicaid Program.

SECOND CLAIM FOR RELIEF
(Strict Products Liability: Design Defect)

29. Plaintiff incorporates paragraphs 1 through 28 as if fully set forth herein, and further alleges as follows:

30. At all times material and relevant to this action, Vioxx was defective in design and manufacture, and was so at the time it was prescribed by doctors participating in the State's Medicaid Program. Vioxx was defective and dangerous in that it caused serious injuries when used for its intended and foreseeable purpose, i.e., when ingested as prescribed and in the manner recommended by Defendant.

31. The defects in Vioxx were known to Defendant at the time of approval by the FDA. Such defects were concealed and withheld from the FDA. Disclosure by Defendant was inaccurate, incomplete, misleading and fraudulent.

32. Defendant knew Vioxx would be used by the consumer without inspection for defect and that the State, physicians and medicinal users of Vioxx were relying upon Defendant's representations that the product was safe.

33. Adequate post-approval testing would have revealed the further extent of the dangers of ingesting Vioxx, and would have shown that Vioxx was unsafe for human

consumption and could cause extensive medical complications and costs for injuries relating to its use.

34. As a proximate and legal result of the design defect, as well as Defendant's failure to adequately test the product so as to discover the defect, the State of Utah has suffered and will continue to suffer the damages alleged in paragraph 19, and is therefore entitled to recover for those damages as well as those outlined in paragraph 20.

35. Defendant's conduct in the design and testing of this drug was fraudulent, reckless, and undertaken with conscious disregard for the rights and safety of others, including the State of Utah. The State is therefore entitled to an award of punitive damages, to punish and make an example of Defendant as set forth in paragraph 28 above.

THIRD CLAIM FOR RELIEF
(Fraud and Negligent Misrepresentation)

36. Plaintiff incorporates paragraphs 1 through 35 as if fully set forth herein, and further alleges as follows:

37. Defendant's warning of side effects associated with Vioxx contained false representations and/or failed to accurately represent the material facts of the full range and severity of side effects and adverse reactions associated with the product.

38. Defendant's claims and assertions to the FDA, the State of Utah, physicians and the general public regarding Vioxx contained false representations as to the safety of Vioxx and its defective design.

39. Defendant was negligent in not making accurate representations regarding the side effects and adverse medical conditions caused by the use of Vioxx.

40. Defendant knew or reasonably should have known through adequate testing that the claims made to the State with respect to the safety of Vioxx were false or incomplete, and misrepresented the material facts regarding the unsafe and defective condition of Vioxx.

41. Defendant's misrepresentations in this regard were done with the intention of inducing the State to approve of the distribution of Vioxx to participants in the Utah Medicaid Program.

42. As a proximate and legal result of Defendant's fraudulent misrepresentations, the State of Utah has suffered and will continue to suffer the damages alleged in paragraph 19, and is therefore entitled to recover for those damages, as well as those outlined in paragraph 20.

43. Defendant's conduct in making these fraudulent representations was deliberate and undertaken with conscious disregard for the rights and safety of others, including the State of Utah. The State is therefore entitled to an award of punitive damages, to punish and make an example of Defendant as set forth in paragraph 28 above.

FOURTH CLAIM FOR RELIEF
(Negligence)

44. Plaintiff incorporates paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

45. Defendant had a duty to exercise reasonable care in the manufacture, sale, and/or distribution of Vioxx, including a duty to ensure that users would not suffer from unreasonable, dangerous, undisclosed or misrepresented side effects. This duty extends to the State of Utah as the party ultimately bearing financial responsibility for Utah Medicaid patients.

46. Defendant breached this duty, as it was negligent in the testing, marketing, manufacture, sale and packaging of Vioxx.

47. As a direct and proximate result of Defendant's negligence, the State of Utah has suffered and will suffer the damages alleged in paragraph 19 above, and is entitled to recover for those damages as well as the damages outlined in paragraph 20.

48. Defendant's negligence in testing, manufacturing, packaging, and marketing Vioxx was fraudulent, reckless, and undertaken with conscious disregard for the rights of others, including the State of Utah. Plaintiff is therefore entitled to an award of punitive damages to punish and make and example of Defendant as set forth in paragraph 28.

FIFTH CLAIM FOR RELIEF
(Breach of Express Warranty)

49. Plaintiff incorporates paragraphs 1 through 48 as if fully set forth herein, and further alleges as follows:

50. In marketing Vioxx and making it available through the Utah Medicaid Program, Defendant expressly warranted to the State, its physicians and Medicaid recipients that Vioxx was safe, effective, fit and proper for its intended use. Pursuant to Utah Code Annotated § 70A-2-313, these express warranties were created by and through statements made by Defendant or Defendant's authorized agents or sales representatives, orally and in publications, package inserts, and in other written materials intended for the State, physicians, medical patients and the general public.

51. The State, its physicians and Medicaid patients relied on the skill, judgment, representations and foregoing express warranties. Such representations were false in that Vioxx was not safe or fit for its intended use.

52. As a direct and legal result of this breach of warranty, the State of Utah has suffered and will continue to suffer damages as set forth in paragraph 19 above. Pursuant to Utah Code Annotated §§ 70A-2-714 and 70A-2-715, the State is therefore entitled to recover those damages, including incidental and consequential damages, from Defendant.

SIXTH CLAIM FOR RELIEF

(Breach of Implied Warranty)

53. Plaintiff incorporates paragraphs 1 through 52 as if fully set forth herein, and further alleges as follows:

54. Pursuant to Utah Code Annotated § 70A-2-314, through the manufacture, marketing, and sale of Vioxx, Defendant impliedly warranted to the State of Utah, its physicians and its Medicaid recipients that Vioxx was of merchantable quality – safe and fit for the use for which it was intended.

55. At all times relevant to this action, Defendant had reason to know of the particular purpose for which the State, its physicians and Medicaid recipients were purchasing and using Vioxx, i.e., for the safe and effective treatment of pain. Therefore, pursuant to Utah Code Annotated § 70A-2-315, Defendant impliedly warranted to the State of Utah, its physicians and its Medicaid recipients that Vioxx was fit for that particular purpose.

56. Defendant had reason to know through actual or constructive knowledge that the State of Utah, its physicians and Medicaid recipients were reasonably relying upon the skill, judgment and implied warranties of Defendant in allowing the use of Vioxx.

57. Defendant breached the implied warranties of merchantability and of fitness for a particular purpose in that Vioxx was neither safe for its intended use nor of merchantable quality, nor was it safe for the particular purpose intended by the State and Medicaid recipients, in that Vioxx had dangerous propensities when put to its intended use, resulting in severe illness and injury to many of its users.

58. As a direct and legal result of this breach of warranty, the State of Utah has suffered and will continue to suffer damages as set forth in paragraph 19 above. Pursuant to Utah Code Annotated §§ 70A-2-714 and 70A-2-715, the State is therefore entitled to recover those damages, including incidental and consequential damages, from Defendant.

SEVENTH CLAIM FOR RELIEF
(Negligence *Per Se*)

59. Plaintiff incorporates paragraphs 1 through 58 as if fully set forth herein, and further alleges as follows:

60. Defendant has an obligation not to violate the law.

61. Defendant has violated the Federal Food, Drug, and Cosmetic Act as set forth in 21 U.S.C. 301, *et seq.*, its related amendments, codes, and federal regulations promulgated thereunder, and other applicable state and federal law.

62. Medicaid patients, as purchasers and consumers of the product, and the State of Utah, as the financially responsible party, are within the class of persons that the statutes

described above are designed to protect. Injury due to design defect, misbranding, false advertising and misleading products is the type of harm these statutes are intended to prevent.

63. Defendants failed to meet the standard of care set by the following regulations, which were intended for the benefit of patients and the State of Utah as the responsible paying party, making Defendant negligent *per se*:

a. The labeling lacked adequate information on the intended use of Vioxx, even though Defendant was aware of the widespread use of Vioxx, in violation of 21 C.F.R. 201.56(a) and (b);

b. The labeling did not state there was a lack of evidence to support the common belief in the safety and efficacy of Vioxx in violation of 21 C.F.R. 201.57(c)(3)(i);

c. The labeling failed to add warnings of the serious side effects including, but not limited to, cardiovascular events, strokes, heart attacks and death as soon as there was reasonable evidence of their association with Vioxx in violation of 21 C.F.R. 201.57(e);

d. The labeling contained inadequate information for patients and physicians to determine the safe and effective use of Vioxx in violation of 21 C.F.R. 201.57(f)(2);

e. The labeling contained inadequate information regarding the level of care and monitoring to be exercised by the doctor for safe and effective use of Vioxx in violation of 21 C.F.R. 201.57(f)(1);

f. Vioxx' labeling and promotion was misleading in violation of 21 C.F.R. 201.56(b);

g. Defendant's advertisements contained untrue and misleading information and/or failed to contain true and accurate statements relating to the side effects, contraindications and effectiveness of Vioxx in violation of 21 C.F.R. 202.1(e), and;

h. Defendant's advertisements for Vioxx were false, lacking in fair balance or otherwise misleading in violation of 21 C.F.R. 202.1(e)(7).

64. Defendant is responsible to the State for economic loss incurred for violations of the statutes and regulations described above under the doctrine of negligence *per se*.

65. As a direct and proximate result of the violations of these statutes, the State of Utah has suffered and will continue to suffer damages as alleged in paragraph 19 above, and is therefore entitled to recover for those damages, as well as the damages outlined in paragraph 20.

EIGHTH CLAIM FOR RELIEF
(Civil Penalties Under the Utah Health Code)

66. Plaintiff incorporates paragraphs 1 through 65 as if fully set forth herein, and further alleges as follows:

67. Defendant violated the False Claims Act of the Utah Health Code as codified in Title 26, Chapter 20 of the Utah Code Annotated. These violations were committed in the following particulars:

a. Defendant made "false statements" or false representations to the State and its agencies in seeking inclusion and payment under the Utah Medicaid Program, in violation of Utah Code Annotated § 26-20-3;

b. Defendant caused false and fraudulent claims for benefit to be made to employees and officers of the State in order to secure inclusion and payment under the Medicaid Program, in violation of Utah Code Annotated § 26-20-7(1);

c. the documentation given by Defendant to the State regarding the safety and efficacy of Vioxx for inclusion and payment under the Medicaid Program was falsified or altered with intent to deceive, in violation of Utah Code Annotated § 26-20-7(2)(j);

d. Defendant's claims to the State for inclusion and payment under the Medicaid Program misrepresented the type and quality of the services rendered by the ingestion of Vioxx, in violation of Utah Code Annotated § 26-20-7(2)(b); and

e. Defendant filed claims for inclusion and payment under the Medicaid program for services and/or goods which it knew were not medically necessary, in violation of Utah Code Annotated § 26-20-7(2)(d).

68. Under the provisions of Utah Code Annotated § 26-20-9.5, Defendant is liable for the following damages:

a. full and complete restitution to the state of all medical benefits improperly obtained;

b. the costs of enforcement, including but not limited to the cost of investigators and attorneys;

c. a civil penalty not to exceed three times the value improperly claimed; and

d. a civil penalty of up to $2,000.00 for each violation.

69. These costs and penalties are in addition to and not a substitute for the damages alleged in paragraph 19 and 20 above.

JURY DEMAND

The State respectfully requests a trial by jury pursuant to Rule 38, Utah R. Civ. Proc.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the State of Utah, prays for judgment against Defendant as follows:

1. an award to Plaintiff in the form of judgment against Defendant Merck for the Vioxx-related damages of past, present and future medical expenses for recipients of the Utah Medicaid Program;

2. the cost of all Vioxx prescriptions paid by the Utah Medicaid Program;

3. for all civil penalties pursuant to the statutes cited herein;

4. for the costs of enforcement pursuant to § 26-20-9.5(b), Utah Code Ann.;

5. for punitive damages for the wanton and reckless conduct of Defendant as outlined herein;

6. for exemplary damages for the benefit of all other drug manufacturers who wrongly misrepresent the safety of their product to the detriment of the State's Medicaid Program;

7. For such other and further relief as may be justified and which Plaintiff may be entitled to by law including, but not limited to, all court costs, witness fees and deposition fees.

Respectfully SUBMITTED and DATED this 27th day of April, 2006

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Attorney General of Utah

David R. Stallard

David R. Stallard
Assistant Attorney General

GARRETSON & STEELE, LLC
Matthew L. Garretson
Joseph W. Steele

ATTORNEYS FOR THE STATE OF UTAH

Exhibit H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HOLMES et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:05CV00439 ERW
	)	
MERCK & CO. et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the Court upon Defendant Merck's Motion to Stay [doc. #7]. A hearing was held on April 27, 2005, and the Court heard arguments from the parties on the Motion.[1]

I. BACKGROUND FACTS

This action concerns the prescription drug VIOXX, manufactured by Defendant Merck. On September 30, 2004, Defendant Merck announced that, in a clinical study known as APPROVe,[2] there was an increased relative risk for confirmed cardiovascular events beginning after 18 months of treatment in patients taking VIOXX compared with those taking a placebo. Defendant Merck subsequently voluntarily withdrew VIOXX from the market. Thereafter, numerous suits were filed across the nation seeking some form of recovery for plaintiffs who had purchased and ingested VIOXX. On October 21, 2004, Defendant Merck filed a motion for coordinated pre-trial proceedings with the Judicial Panel on Multidistrict Litigation (the "MDL"), requesting that all of the

[1]During this hearing, the Court also heard arguments from the parties on Plaintiff Holmes's Motion to Remand [doc. #29].

[2]The APPROVe study was a prospective, randomized, placebo-controlled clinical trial designed to evaluate the efficacy of VIOXX 25 mg. in preventing recurrence of colorectal polyps in patients with a history of collerectal adenomas.

VIOXX cases be coordinated in a single district court.

II. STANDARD OF REVIEW

A district court has the inherent power to stay its proceedings. This power is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). This power requires a court to exercise its "judgment, which must weigh competing interests and maintain an even balance." *Id.* A court need not automatically stay a case merely because a party has moved the MDL for transfer and consolidation. *See Rivers v. Walt Disney*, 980 F.Supp. 1358, 1360 (C.D. Cal. 1997). In considering a motion for stay, a court should consider both the interest of judicial economy and the potential prejudice or hardship to the parties. *Id.*

III. DISCUSSION

In its Motion, Defendant Merck requests that the Court stay all proceedings in this action pending resolution of its motion currently before the MDL Panel for transfer of this case, and numerous other cases with certain overlapping factual issues and similar legal theories, to a single court for coordinated pretrial management. In support of its Motion, Defendant Merck argues that judicial economy mandates a stay because, without a stay, (1) much of the Court's work will be needlessly duplicated; and (2) Defendant Merck will be substantially prejudiced by duplicative discovery and motion practice. According to Defendant Merck, the issues raised by Plaintiffs' remand motion are similar to those raised in other cases that have been and likely will be transferred to a central court pursuant to certain MDL orders, and that court should be allowed to decide the remand issue to ensure all defendants are treated in a uniform manner.[3] In opposing the Motion,

[3]According to Defendant, stay orders have been issued in more than 175 VIOXX-related cases across the nation, and several of these 175 cases include pending remand motions.

Plaintiffs state that the MDL rules specifically authorize the Court to rule on their pending Motion to Remand. Plaintiffs argue that the Court should rule on Plaintiffs' Motion to Remand before considering the Motion to Stay because (1) judicial economy weighs in favor of ruling the Motion to Remand because, if the Motion is granted, no further federal resources would be expended on this case; and (2) issuing a stay would be prejudicial to the rights of Plaintiffs because a stay will substantially delay Plaintiffs' recovery.

After considering the arguments made by the parties, the Court concludes that the factors weigh in favor of staying this action. At the hearing on this matter, Defendant Merck pointed out that the MDL panel has now issued five conditional transfer orders affecting about 400 VIOXX cases. Defendant Merck further stated that there are currently 46 actions with pending motions to remand. Therefore, the transferee court hearing the coordinated cases will decide many of the same issues this Court would determine with regard to Plaintiffs' pending Motion to Remand. Although Plaintiffs are correct in pointing out that the Court does have the power to decide their pending Motion to Remand rather than staying this action, the Court finds Defendant Merck's judicial economy argument persuasive and concludes that judicial economy weighs heavily in favor of granting the requested stay.

The Court also considers the resulting prejudice to the parties. Plaintiffs argue that a stay will prejudice them because it will delay their opportunity for recovery. The Court concludes that, although Plaintiffs might well be subjected to some delay as a result of the issuance of a stay, that prejudice does not outweigh the judicial economy interests described above. Therefore, Defendant Merck's Motion will be granted.

Accordingly,

IT IS HEREBY ORDERED that Defendant Merck's Motion to Stay [doc. #7] is **GRANTED**. All motions currently pending before this Court are **DENIED, as moot**, with leave to refile at a later date, if necessary.

Dated this 3rd day of May, 2005.

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

Exhibit I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION	*	MDL NO. 1657
	*	SECTION: L(3)
	*	JUDGE FALLON MAG. JUDGE KNOWLES

THIS DOCUMENT RELATES TO:
Tallas, et al. v. Merck & Co., Inc., et al., 06-3152

ORDER

The Court heard oral argument on August 30, 2006 on the Plaintiff's Motion to Remand (Rec. Doc. 6228). For reasons stated on the record, the Plaintiff's motion is GRANTED and this matter is REMANDED to the Philadelphia Court of Common Pleas.

As an MDL Court, this Court has been charged with the task of presiding over thousands of cases involving hundreds of thousands of litigants. To promote the just and efficient conduct of these actions, the Court has previously indicated that it would deal with remand motions as a group in accordance with procedures to be determined at a future date. The Court is still committed to this plan. The facts of the present case, however, were so exceptional that they justified the Court's taking earlier action.

New Orleans, Louisiana; this 5th day of September, 2006.

Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX	*	**MDL NO. 1657**
PRODUCTS LIABILITY LITIGATION	*	
	*	**SECTION: L(3)**
	*	
	*	**JUDGE FALLON**
	*	**MAG. JUDGE KNOWLES**

* *

THIS DOCUMENT RELATES TO
Felicia Garza, et al. v. Michael D. Evans, M.D., et al.

ORDER AND REASONS

Pending before the Court is Plaintiffs' Motion to Remand. For the following reasons, the motion is GRANTED.

I. FACTS

This a medical malpractice/products liability case arising out of the death of Leonel Garza, Sr. During the spring of 2001, cardiologists Dr. Michael D. Evans and Dr. Juan D. Posada ("Defendant Doctors"), who are citizens of Texas, treated Mr. Garza for a heart condition. In the course of this treatment, Defendant Doctors prescribed Mr. Garza Vioxx. Vioxx was designed, manufactured, and marketed by Merck & Co. Inc. ("Merck"), which is a citizen of New Jersey. On April 21, 2001, while still being treated with Vioxx, Mr. Garza died of a heart attack.

On March 10, 2003, the Plaintiffs, the survivors of Mr. Garza and citizens of Texas, initiated this action in the 229th Judicial District Court of Starr County, Texas. Plaintiffs

asserted various products liability theories against Merck. In addition, Plaintiffs also asserted negligence and products liability claims against Defendant Doctors.

On March 17, 2003, Merck was served with a copy of the Plaintiffs' Original Petition. On April 16, 2003, Merck removed this case to the Southern District of Texas contending that the Defendant Doctors were improperly joined to defeat diversity jurisdiction. On May 16, 2003, Plaintiffs moved to remand.

To support their remand motion, Plaintiffs claimed that they asserted three viable legal theories against the Defendant Doctors and, as such, the Defendant Doctors were not improperly joined. First, the Plaintiffs asserted that they had stated a negligence claim against the Defendant Doctors because the Defendant Doctors negligently prescribed Vioxx to Mr. Garza when they knew or should have known of an adverse risk of heart attack from the drug. Second, Plaintiffs asserted that they had stated a claim against the Doctor Defendants based on a theory of negligent misdiagnosis of Mr. Garza's symptoms. Third, Plaintiffs asserted that they had stated various products liability theories against the Defendant Doctors.

In support of the two negligence theories, Plaintiffs attached affidavits from two medical experts—Dr. Simonini and Dr. Bush. Dr. Simonini claimed that the Defendant Doctors breached the applicable standard of care by negligently dispensing Vioxx to Mr. Garza in the face of known cardiac risks and by negligently misdiagnosing Mr. Garza's symptoms. Dr. Bush claimed that the Defendant Doctors negligently misdiagnosed Mr. Garza's symptoms, but did not render any opinion concerning the negligent dispensation theory. On July 31, 2003, the Southern District of Texas remanded the case concluding that the Plaintiffs had stated a potentially viable negligence claim against the Defendant Doctors.

On April 23, 2004, after the Southern District of Texas remanded the case, the parties entered into an Agreed Order Setting Jury Trial, which provided for a Monday, November 8, 2004 trial setting and an alternative trial date of Monday, February 14, 2005.

On August 21, 2004, Merck filed a Motion to Adopt the February 14, 2005 trial setting. This motion was granted by the 229th Judicial District Court of Starr County on September 15, 2004. The Plaintiff asserts that this Motion To Adopt was Merck's first continuance.

On September 30, 2004, Merck recalled Vioxx based on the findings in the APPROVe study, which sought to determine whether Vioxx was a viable treatment for colon polyps. Based on the findings of the APPROVe study, Merck filed a second motion to continue on October 22, 2004.

On December 9, 2004, Merck took the deposition of Dr. Simonini, the expert cardiologist whose affidavit the Plaintiffs submitted to the Southern District of Texas with its motion to remand. In his affidavit, Dr. Simonini testified that the Defendant Doctors had acted negligently because a reasonable and prudent physician would have known of the risks associated with Vioxx and would not have dispensed Vioxx to Mr. Garza. In addition, Dr. Simonini also testified that the Defendant Doctors had negligently misdiagnosed Mr. Garza's condition. At his deposition, however, Dr. Simonini changed his position and refused to attribute any blame to the Defendant Doctors.

On January 12, 2005, Merck filed its third motion to continue. Under Texas law, attorneys elected to the state legislature are afforded the benefit of a "legislative continuance," which allows state legislators to push back their civil trials until thirty days after the legislature adjourns. The "legislative continuance" only applies if the attorney legislator is hired at least

thirty days prior to the commencement of trial.

The Texas Legislature convened on Tuesday, January 11, 2005. On Wednesday, January 12, 2005, just two days prior to the thirty day deadline regarding legislative continuances, Merck filed a Notice of Appearance adding State Senator Juan Hinojosa as counsel. On January 13, 2005, after some local media exposure, Senator Hinojosa withdrew the motion to continue alleging that it was signed by mistake.

On January 14, 2005, Merck filed its fourth motion to continue. This time Merck added State Representative Rene Oliveira as counsel. In addition, on the same date, Merck filed a supplemental motion to continue, which the Plaintiff's classify as Merck's fifth motion to continue.

On January 18, 2005, Merck filed its second notice of removal. On January 24, 2005, the Plaintiffs filed a motion to remand. A hearing on this motion was set for February 24, 2005. On February 16, 2005, however, the Judicial Panel on Multidistrict Litigation ("Panel") issued a conditional transfer order in this case. On June 20, 2005, the Panel issued a final transfer order transferring this case to the Eastern District of Louisiana as part of MDL 1657.

II. MOTION TO REMAND

In its second notice of removal, Merck asserted that the Plaintiffs no longer had any viable causes of action against the Defendant Doctors. On December 17, 2004, the Plaintiffs filed a Second Amended Original Petition in which they dropped their previous allegations that the Defendant Doctors were liable for negligent misdiagnosis. Additionally, the Plaintiffs had previously dropped their products liability claims against the Defendant Doctors. Thus, at present and at the time of the second notice of removal, the only remaining claim against the

Defendant Doctors was the negligent dispensation claim. Merck claims that the Plaintiffs have no possibility of recovery based on the negligent dispensation claim because Dr. Simonini, the Plaintiffs' expert regarding negligent dispensation, changed his testimony at his deposition and asserted that the Defendant Doctors were not negligent.

In addition, Merck claims that the one year time limit for diversity removals under section 1446(b) of title 28 of the United States Code should be equitably tolled in this case. Based upon *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003), Merck asserts that the one year time limit should be equitably tolled because the Plaintiffs improperly joined the Defendant Doctors to manipulate the forum. This claim is based on the change of Dr. Simonini's testimony and the Plaintiffs' voluntary dismissal of their other two theories of liability—all of which occurred more than one year after the commencement of the action.

The Plaintiffs assert that the one year time limit to section 1446(b) prevents Merck from removing this case and that the facts of this case do not warrant the equitable tolling of section 1446(b)'s one year time limit. Second, even if the one year time limit of 1446(b) is equitably tolled, the Plaintiffs argue that they still have a possibility of recovery against the Defendant Doctors and, as such, the Defendant Doctors are not improperly joined and their citizenship should be taken into account for diversity jurisdiction purposes.

III. LAW AND ANALYSIS

If a case is not initially removable at the time of filing, a defendant may remove the case within thirty days of receipt of an amended pleading, motion, order, or other paper that indicates that the case is removable. 28 U.S.C. § 1446(b). A case, however, may not be removed on the basis of diversity jurisdiction more than one year after the commencement of the action. *Id.*

Section 1446(b)'s one year time limit was enacted to prevent the removal of an action wherein substantial progress had been made in state court. *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886-87 (5th Cir. 1998).

The Plaintiffs filed this case on March 10, 2003. Merck removed this case on January 18, 2005, well beyond the one year time limit. Merck concedes that the plain language of section 1446(b) precludes the removal of this action, but asserts that the principle of equitable tolling permits it to remove this case after the one year time limit.

In *Tedford v. Warner-Lambert Co.*, the Fifth Circuit held that section 1446(b) is subject to an exception of equitable estoppel. 327 F.3d 423, 426 (5th Cir. 2003). In *Tedford*, the plaintiff filed suit against several defendants, including one non-diverse defendant, in Texas state court. *Id.* at 424. Through discovery, Warner-Lambert, a defendant in the case, learned that the non-diverse defendant was not a proper party to the suit. *Id.* at 425. As such, Warner-Lambert informed the plaintiff of its intent to remove the case based on diversity jurisdiction. *Id.* A mere three hours later and before the notice of removal was filed, the plaintiff added another non-diverse defendant to prevent diversity jurisdiction and defeat removal. *Id.* Soon thereafter, without taking any discovery from the newly added non-diverse defendant and without providing the newly added defendant with proper notice under the Texas Medical Liability and Insurance Improvement Act, the plaintiff signed and postdated a notice of non-suit as to the newly added non-diverse defendant before the expiration of the one year time limit, but did not file the notice until after the one year time limit passed. *Id.* Ten days after the expiration of the one year time limit, Warner-Lambert removed the case to federal court. *Id.* The Fifth Circuit found that the plaintiff's blatant forum manipulation and the defendant's vigilance in seeking removal justified

the application of an equitable exception of estoppel. *Id.* at 428.

In addition to the Fifth Circuit in *Tedford*, other courts have equitably tolled section 1446(b)'s one year time limit based upon showings of both the plaintiff's forum manipulation and the defendant's rapid response in protecting his removal rights.[1] For example, in *Morrison v. National Benefit Life Ins. Co.*, where removal was permitted, the plaintiffs made a straight-forward admission of forum manipulation, and the defendants removed the case eight days after learning that the case fell within federal diversity jurisdiction. 889 F.Supp. 945, 947 (S.D. Miss. 1995). In *Kinabrew v. Emco-Wheaton, Inc.*, where removal was permitted, the plaintiffs deliberately withheld service of process on the defendant until after the one year period had expired, and the defendants removed the case within one month of service of process. 936 F.Supp. 351, 352-53 (M.D. La. 1996). In *Ardoin v. Stine Lumber Co.*, where removal was permitted, the plaintiffs filed suit against both diverse and non-diverse defendants. 298 F.Supp.2d 422, 427 (W.D. La. 2003). After one year had elapsed from the commencement of the action, the plaintiffs strategically dismissed the non-diverse defendants. *Id.* On the same day that the last non-diverse defendant was dismissed, the remaining defendants filed a notice of removal. *Id.* At oral argument on the plaintiff's motion to remand, the plaintiffs failed to articulate any justifiable reason for dismissing the non-diverse defendants more than one year after the initial filing of suit. *Id.* Accordingly, the court found that the plaintiffs had participated in forum manipulation and that the defendants had sought to vigilantly protect their removal rights. *Id.* at 429.

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[1] For a list of cases regarding the equitable tolling of section 1446(b)'s one year time limit, see 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3732 n.82 (3d ed. 1998 & Supp. 2005).

In *Tedford*, *Morrison*, *Kinabrew*, and *Ardoin*, the courts equitably tolled section 1446(b)'s one year time limit because all the plaintiffs engaged in clear instances of forum manipulation and all the defendants rapidly removed the cases. Likewise, Merck argues that the Plaintiffs have engaged in forum manipulation. Merck contends that Dr. Simonini's change in testimony and the Plaintiffs' dismissal of two of their three theories of liability against the Defendant Doctors amounts to forum manipulation and justifies the application of the *Tedford* equitable exception.

Despite the Fifth Circuit's holding in *Tedford*, the party invoking removal jurisdiction bears the burden of establishing jurisdiction. *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997). Merck fails to meet this burden.

Even though one of the Plaintiffs' expert changed his opinion and the Plaintiffs have voluntarily dismissed two of their three causes of action against the Defendant Doctors, the facts of this case do not rise to the level of *Tedford* or the cases leading to and flowing from it. Unlike *Tedford*, the Plaintiffs have complied with the Texas Medical Liability and Insurance Improvement Act by providing the Defendant Doctors with notice letters. The Plaintiffs have not abandoned their claims against the Defendant Doctors; but, instead, they have propounded formal, written discovery to the Defendant Doctors and have taken the deposition of Dr. Evans. In addition, the Plaintiffs have defended and defeated the Defendant Doctors's Motion for Summary Judgement. Moreover, the Plaintiffs have even cross-examined two of Merck's medical experts regarding Dr. Evans' opinion that he would continue to prescribe Vioxx to patients with known cardiovascular risks even after the FDA instructed Merck to include warnings in Vioxx packages in 2002. Lastly, Dr. Bush, the Plaintiffs' other medical expert, has

submitted a second affidavit in which he testifies that the Defendant Doctors did negligently dispense Vioxx to Mr. Garza. All of these facts lead to the conclusion that the Plaintiffs have actively pursued their claims against the Defendant Doctors in the hopes of recovery, not in the hopes of evading federal jurisdiction. Accordingly, the facts of this case simply do not rise to the level of *Tedford*, *Morrison*, *Kinabrew*, or *Ardoin*.

Furthermore, Merck has not been vigilant in asserting its rights. Dr. Simonini's deposition took place on December 9, 2004. Merck filed its second notice of removal on January 18, 2005. In stark contrast to the defendants in the previously mentioned cases, Merck waited over a month to remove its case to federal court. This unexplained delay does not amount to the vigilant protection of removal rights.

Moreover, even if section 1446(b)'s one year time limit was not applicable to this case, Merck would have still been required to file its notice of removal within thirty days of Dr. Simonini's deposition. If a case is not initially removable, as this one was not, a defendant has thirty days to remove the case from the receipt of an amended pleading, motion, order, or other paper that indicates that the case is removable. 28 U.S.C. § 1446(b). A deposition is considered an "other paper." *Poole v. Western Gas Res.*, No. CIV.A.97-2929, 1997 WL 722958, at *2 (E.D. La. Nov. 18, 1997) (finding that there was no functional difference between a deposition and a deposition transcript and, as such, a deposition was considered an "other paper" under the holding of *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996). *Contra Rivers v. Int'l Matex Tank Terminal*, 864 F.Supp. 556, 559 (E.D. La. 1994). Therefore, Merck would have been required to remove this case before January 18, 2005, even if section 1446(b)'s one year time limit did not apply.

Accordingly, since the Plaintiffs did not engage in blatant forum manipulation, Merck did not vigilantly assert its removal rights, and this action has already made substantial progress in state court, this case is not subject to the *Tedford* equitable exception of estoppel. Since the Court has found that this case is not subject to the equitable exception of estoppel, it is unnecessary to reach the issue of whether the Plaintiffs have a possibility of recovery.

As an MDL Court, this Court has been charged with the task of presiding over thousands of cases involving hundreds of thousands of litigants. To promote the just and efficient conduct of these actions, the Court has previously indicated that it would deal with remand motions as a group in accordance with procedures to be determined at a future date. The Court is still committed to this plan.

The facts of the present case, however, were so exceptional that they justified the Court's taking earlier action. Merck's conduct in postponing the trial of this action can be classified as peculiar, at best. Regardless of the classification, the facts of the present case, unlike those of other cases pending before the Court, necessitate that the Court take action.

III. CONCLUSION

For the reasons set forth above, IT IS ORDERED that the Plaintiffs' Motion to Remand is GRANTED and this matter is REMANDED to the 229th Judicial District Court of Starr County, Texas.

New Orleans, Louisiana, this 22nd day of November, 2005.

UNITED STATES DISTRICT JUDGE

Exhibit J

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION	*	MDL NO. 1657
	*	SECTION: L(3)
	*	JUDGE FALLON
	*	MAG. JUDGE KNOWLES

* *

THIS DOCUMENT RELATES TO:
Flippin, et al. v. Merck & Co., Inc., et al., No. 05-1797

ORDER

At the last monthly status conference, the State Liaison Committee brought the above-captioned case to the Court's attention. Accordingly, IT IS ORDERED that the Plaintiffs' Motion to Remand, which was filed on March 25, 2005 in the United States District Court for the Western District of Tennessee (C.A. 1-05-1068) before this case was transferred into the MDL, shall be heard on September 6, 2007, with oral argument, following the next monthly status conference. IT IS FURTHER ORDERED that the Defendants shall file any opposition no later than August 28, 2007, and that the Plaintiffs shall file any reply no later than September 4, 2007.

New Orleans, Louisiana, this 8th day of August, 2007.

Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

Exhibit K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION * Docket MDL 1657-L
*
* August 25, 2005, 9:30 a.m.
* * * * * * * * * * * * * * * * * *

STATUS CONFERENCE BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Beasley, Allen, Crow, Methvin, PORTIS & MILES
BY: ANDY D. BIRCHFIELD, JR., ESQ.
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For the Defendants: Stone Pigman Walther Wittmann
BY: PHILLIP A. WITTMANN, ESQ.
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(504) 589-7778

Proceedings recorded by mechanical stenography, transcript produced by computer.

PROCEEDINGS

(August 25, 2005)

THE DEPUTY CLERK: Everyone rise.

THE COURT: Be seated, please. Good morning, Ladies and Gentlemen. Call the case, please.

THE DEPUTY CLERK: MDL 1657, In Re: Vioxx.

THE COURT: Counsel, make your appearances for the record.

MR. BIRCHFIELD: Good morning, Your Honor. Andy Birchfield on behalf of the plaintiffs' steering committee.

MR. WITTMANN: Good morning, Your Honor. Phil Wittmann, defendants' liaison counsel.

THE COURT: We are here today for our monthly status report. I met with liaison counsel before and discussed with them the upcoming meeting. The first item on the agenda is Lexis/Nexis File & Serve. Any report on that?

MR. WITTMANN: Just briefly, Your Honor. The system seems to be working well. We have got a new feature that's been added this month by Lexis/Nexis. It's known as Case & Party Management. It allows counsel to add a party if a party is added to the case or remove a party if someone is dismissed from the case, add additional attorneys in the case. That all is done electronically. There still has to be an order attached confirming that's permitted by the Court. It

can be done electronically and should help expedite adding to the service list.

Also, in early August 2005 Lexis/Nexis began a nightly pull from the clerk's office to get cases into the system quickly. The cases are uploaded every Monday, Wednesday, and Friday so that the parties will have quick access via File & Serve to new cases as they come on line. Other than that, Judge, that's about all to report. I don't have any problems working with the system. I haven't heard any reported from plaintiffs' counsel either.

MR. BIRCHFIELD: Your Honor, we do not have any problems to report. Everything seems to be working fine. I would like to encourage the lawyers to take advantage of the new features that have been added to Lexis/Nexis. It will greatly increase the efficiency of that program.

THE COURT: I met, as you know, with their representatives, as well as liaison counsel, and I'm glad things have worked out. If we get any hitches again, you've got to get me involved early on so we can deal with it before it becomes a crisis. I'm happy that it's up and running now. State court trial settings is the next item on the agenda.

MR. WITTMANN: Yes, Your Honor. I can give you a report of the case statistics generally as of August 15. There are currently 1,811 cases in the MDL. Some haven't been served yet, but they have all been transferred and are here and are

being docketed by the clerk. There are approximately 290 additional cases served and pending in federal courts not yet in the MDL, but they will be on the way shortly. So we will be over the 2,000 mark in cases in the MDL by the end of this month.

There are 200 cases served and pending in state courts other than New Jersey and California. There are 2,400 cases served and pending in the New Jersey coordinated proceeding. Finally, there are 250 cases served and pending in California in state court. Those cases involve about 1,650 plaintiffs. Included in those numbers, Your Honor, are 148 class actions. That's an increase in the number of class actions from last month. I have agreed to give Arnold Levin a copy of the new cases that we received since our last status conference report. As to the trial settings, as Your Honor --

THE COURT: Before we get into that, let me discuss numbers with you. Numbers are important because of our clerk's office, particularly. We need to be thinking about increasing the personnel to handle the matter, and I know the clerk's office has been doing it. As I understand it, you all anticipate either double or triple what we have now in the MDL in the next six months or thereabouts. I know, in addition, we have what I suspect to be several thousand cases on tolling agreements, so that will not necessitate filing at this time.

MR. WITTMANN: The estimate I heard from the

plaintiffs' counsel this month is they anticipate a doubling of the number in the MDL. I would not disagree with that.

THE COURT: It may be a little early to tell. I know at one time we were anticipating something like approximately 100,000 individual cases. I don't know whether that will show up in tolling agreements or whether it will show up in individual filings, but we will have to take that a step at a time. The state court settings.

MR. WITTMANN: As to the settings, Your Honor, there was a verdict returned last week in Texas in the Ernst case. Merck has indicated it intends to file an appeal. The Humeston case is set for trial in the New Jersey superior court on September 12, 2005. The Guerra case is set for trial in the Texas district court in Hidalgo County on October 24, 2005. Our case, the Irvin case, is set in the MDL on November 28, 2005. The Zajicek case is set for trial in Texas in Jackson County on March 20, 2006. Those are the only settings I'm aware of at this time.

THE COURT: Let's segue into the federal court litigation. As you mentioned, the Irvin case is set for trial to commence on November 28. I met with counsel to discuss a program for setting additional trials. I would like counsel to meet and talk about categories of cases. One category, of course, is the MIs and then we are dealing with both long-term use and short-term use. In addition, there's a category of

strokes and a couple of other categories. You know best. Select the categories, and then I'm interested in trying a case in each of those categories. I have given counsel dates in February, March, April, and May on which those cases will be tried. What are the dates, again?

MR. BIRCHFIELD: Your Honor, February 13, March 13, and April 10. I'm not sure of the date in May.

THE COURT: We'll discuss which cases are to be set. My thinking is to have a case per category if we can possibly do it. It would be best if both sides could coordinate that and pick a particular case. You know the best cases from the standpoint of which cases are ready for trial and would be helpful to you in getting a feel for this type of category in this type of litigation. I hope you can join together and pick a case that will be instructive in each of those categories. If that cannot be done, then the Court will pick the case. I will allow you to first attempt to agree upon a case that will be most instructive to each side in those particular categories. The next item on the agenda is class actions. Anything on the class actions?

MR. BIRCHFIELD: Your Honor, Arnold Levin would like to address that on behalf of the plaintiffs.

MR. LEVIN: Your Honor, as we explained to you in the liaison committee meeting this morning, first we would like to have the complaints -- which we are getting additional

complaints -- because they may present class representatives for subclasses that are headless at the present time. We are going to meet with defense counsel next week via telephone to see if we can streamline the proceedings by maybe staging and determining whether Rule 12 motions are being filed. I'm happy to report that we have an agreement on one thing. Both sides need more pages.

THE COURT: I do think it's important to see if there can be some meeting of the minds on how to handle the class actions. There are various issues in the class actions, issues that are complicated by the law of where the class actions are to be tried and, if they are to be tried here, which court of appeals handles the appellate review for that particular class action. It can be done in several ways. It's best if counsel present me with something that is agreeable to both sides. It's a question of whether I go to a particular place and try the case or have the trials here, with the understanding that the law applicable to that case will be the law of another area. I may have to be designated judge for that particular district or that particular circuit, so that a different circuit will handle different class actions depending on where they emanate from. Discovery directed to Merck is the next item.

MR. BIRCHFIELD: Your Honor, yesterday we held the weekly conference to address the discovery issues, and out of

that conference it was agreed that Merck would provide us with specific answers to requests for production of documents and interrogatories on September 15. There were a couple of items that will be taken up tomorrow, in a conference with the Court, on the privilege log and on the depositions that will be scheduled that are in dispute at this time.

THE COURT: I have had some telephone conversations and conferences with the parties since our last conference here, over the past month, and there were a number of discovery disputes. It seemed to me that the most efficient way of handling this aspect of the case is to set a discovery meeting every Thursday with the Court. At that time I will handle any discovery disputes that have come up for that week or the week hence. I'll give each side an opportunity to discuss it with me, I'll listen, but then I will rule on it so we can move on.

I think it's essential that we move quickly on discovery in this case. We can't be bogged down in discovery. So rather than do it by way of filing interrogatories and objections and noticing the objections for hearing, we should be able to cut through that. You just say what you need. If a party doesn't want to give it, that Thursday we will talk about it and I will tell you whether or not they need to give it or not give it and we will move to the next issue.

We are going to have a meeting every Thursday with counsel. I can do it over the phone or in person,

whichever is convenient with counsel. It's not necessary for us to have this big of a meeting. I'm just interested in the discovery issue and the people who will handle those issues, either the liaison committee, a liaison person, or somebody that they select who knows that particular issue. We'll get them on the line and I'll handle it. Hopefully, when we get further along, we may not need the every-Thursday meeting, but until further notice we will have a meeting every Thursday.

MR. WITTMANN: If I could just clarify one thing on the discovery, Your Honor, what we agreed to yesterday was we would answer or object to specific interrogatories or requests for production. I would also just like to add, Your Honor, that production of documents from Merck has been ongoing. We have produced a million documents just last week. Another two million is scheduled to go in addition to the nine million we have already produced. I want to make it clear that we are continuing to produce and discuss with plaintiffs' steering committee members what we are doing, even though we are discussing the specific answers that we are going to respond to by September 15.

THE COURT: No, I have a feeling that matters are moving. It's just that we have to move the pace up a little bit because we are setting some trials. We just have to cut through some of this. I do think that Merck is doing yeoman work in producing the material. I recognize that. Also, in

these matters, occasionally you hit a bump in the road and you need to be moved over that. I'm prepared to do that.

MR. BIRCHFIELD: Your Honor, also on that issue, there were two matters that will need to be brought to the Court by a motion to compel, the Arcoxia and the foreign label issue. We are prepared to file that motion and request an expedited hearing on those matters.

THE COURT: Set it for Thursday. PSC request for production of FACTS database.

MR. BIRCHFIELD: Yes, Your Honor. You had scheduled a feasibility hearing. However, we were able to get together and we have now negotiated an agreed-upon order that is ready to be submitted to the Court.

MR. WITTMANN: Actually, it should be submitted to you today. I figured out where in Florida that city was, Your Honor.

THE COURT: The next item is Vioxx professional representatives.

MR. BIRCHFIELD: Your Honor, as the Court instructed, Merck produced a list of Vioxx professional representatives to the Court in camera. Plaintiffs' liaison counsel has reviewed those.

THE COURT: That was an issue. The way we resolved it is to have Merck produce a list of all of their representatives, with their addresses, in camera. I've

reviewed them. The PSC has had an opportunity to review them, also.

The next item is discovery directed to the FDA. Any report on that? I had a conference with the FDA and liaison counsel to discuss some issues that they were having some difficulty on. Hopefully we have overcome those issues. I understand that you are beginning now to get boxes of material. I understand that there has been three boxes that have been received and several hundred thousand documents that are being reviewed. I would like to continue to interface with the FDA, so counsel should keep me plugged into that situation. I'll have periodic meetings with the FDA and counsel and we'll see if we can expedite the receipt of some of that material.

MR. BIRCHFIELD: The meeting with the FDA and the Court was very helpful, Your Honor, and the FDA is producing documents. They are continuing to produce those on a rolling basis. We are reviewing and coding those documents.

THE COURT: I should also express my appreciation to the FDA. I know they have a lot on their plate these days. They have given us access to documents that have been submitted in congressional inquiries, and some of the security that they have to go through has been expedited. I appreciate their efforts in that regard. The discovery directed to third parties, anything to report on that? How is that coming along?

MR. BIRCHFIELD: That's moving along quite well,

Your Honor. We are receiving some documents in response to the third-party subpoenas. We have an agreement with the defendants that we will scan and provide them with all the documents that we receive and they will do the same thing. Any documents that are received in response to third-party subpoenas are going to be shared by the parties by agreement. We are working out an arrangement, but that's the most efficient way of doing it, by scanning and providing an electronic copy.

THE COURT: Anything further on that?

MR. WITTMANN: No. That's correct, Your Honor.

THE COURT: The next item is deposition scheduling.

MR. WITTMANN: Yes, Your Honor. The plaintiffs have noticed three depositions which are scheduled, Dr. Barr, Dr. Block, and Thomas Cannell. We are trying to get dates for two former employees that the plaintiffs want to depose, Dr. Geba and Marty Carroll. We have objected to the redeposition of James Dunn and Susan Baumgartner. Your Honor set argument tomorrow to discuss that issue. We will be in court with Your Honor tomorrow to talk about that. The deposition of Dr. Avorn, scheduled on September 8 in the New Jersey proceeding, has been cross-noticed in the MDL. I think that pretty well covers what our deposition schedules are at this point from our standpoint.

THE COURT: With regard to the case that we have set

for trial, the Irvin case, I met with trial counsel and I'll be meeting with them shortly again to discuss some of the logistics. Any discovery that you need, I want to meet and talk with you about it. The same way from the defendants' standpoint. Any discovery that they need, we have to put that on an extra-fast track.

I talked to the parties about the number of jurors we will need for that particular case and talked to the parties about whether or not we would get some help from a jury questionnaire. We talked about some advance summary of jury charges being given to the jury before they begin to hear the case so they will understand what some of the legal principles are before they process the facts and other issues such as use of technology in the courtroom, what they will need. I will be talking to the trial counsel in that particular case both on discovery and some other aspects of the trial.

MR. BIRCHFIELD: Your Honor, in the Irvin case, we actually have some depositions that have been scheduled and have actually taken place this week. There's an additional deposition tomorrow and then depositions next week, as well. We are moving forward on the discovery in that case. As far as the depositions that are scheduled, Mr. Wittmann is correct. We do have depositions we do need dates for, Dr. Geba and Dr. Marty Carroll. I understand we will get those today.

MR. WITTMANN: Hopefully. They are no longer

employed by Merck. That's why it's difficult to arrange.

MR. BIRCHFIELD: Also, Your Honor, there had been a motion for protective order with regards to the unilateral cross-noticing of the MDL depositions. We have worked out an agreement on that. We will communicate and the PSC will be involved in the scheduling as much as we can be on those depositions. I don't think that there's any reason for the Court to rule on that. I think we have worked that out among the parties.

THE COURT: That's important because the depositions that are been taken in state court ought to be able to be used in the MDL. The depositions in the MDL ought to be able to be used in state court. To give everybody comfort on that situation, they ought to have notice of it. They ought to know what's coming up so they can deal with it and protect their interests. I'm glad you have been able to get together on that. Plaintiff profile form and Merck profile form, anything on that?

MR. BIRCHFIELD: Your Honor, the profile forms, that process seems to be working smoothly. If I could just go back, Your Honor, to the scheduling of the depositions and to avoid issues with cross-noticing, it's just important from our perspective that we be involved in the scheduling of those.

THE COURT: I do want both sides to be involved in the scheduling of those depositions, both state and federal. I

want everybody to know what depositions are coming up before they come up and have some input on it. We talked about the profile forms. That's on our web site. If anybody has any interest in them, they can pull them down and look at them. Medical records from healthcare providers is the next item on the agenda.

MR. WITTMANN: That's working as it's supposed to, Your Honor, in accordance with Pretrial Order 17. We have had no problems with that.

THE COURT: Contact with claimants' healthcare providers. I issued another order on that. It's on the web site. It shouldn't present a problem any longer. Remand issues. Ms. Barrios, do you have anything on that?

MS. BARRIOS: Yes, Your Honor. Good morning, Your Honor. Dawn Barrios for the state liaison committee. On behalf of the entire committee, we would like to extend our appreciation to the Court for reaching out to us to assist with substantive issues. We stand ready, willing, and able to help in anything else, with regards to remands or any other issues.

After you handed down your order, we were in touch with Merck and we learned that Merck did not keep a list of cases with motions to remand, so we felt we had a yeoman's task ahead of us. We reached out to all plaintiffs' counsel across the country in a special newsletter which was electronically sent to about 800 people and hard copies to

about 200. We got a tremendous response from that. We then turned to the PACER system and reviewed the PACER records for each district court in the United States. With that information, we were able to amass a list of approximately 250 cases with pending motions to remand.

Last evening, after the close of business, we received Merck's list. They were simultaneously putting a list together. A quick comparison that we were able to do under the time restraints yielded an additional 130 cases that Merck had. We are working now from an inventory that should be substantially complete of approximately 380 cases that are pending before Your Honor with remand motions.

I beg the Court's indulgence for some extra time until tomorrow. I've spoken with Ms. Wimberly. Both of our offices are going to compare each other's lists. I'm going to present to you a comprehensive list of all those cases. I'm prepared to give you one that we have today. We have an electronic copy as well as a hard copy. You will see, Your Honor, on this disk we have two lists of cases. We have the cases that are pending remand, the 250 that the plaintiffs were able to find. We have grouped them by state. The second list are those cases which have orders on the remand motion. I know it's not authoritative for Your Honor, but I thought it would be beneficial for you to see those additional cases.

With Your Honor's permission, I indicated to

Mr. Wynne when I spoke with him that within approximately a week or 10 days we will present Your Honor with a CD-ROM that will have all the cases that defense and plaintiffs have been able to put together. We will hyperlink all the motions, the memos in support and the opposing memos, for ease of Your Honor's work when you go to look at this issue.

In reviewing this material over the past month, it's come to light that Your Honor is absolutely correct there are different nuggets and threads throughout all of these motions. If the Court would like, we are willing to undertake a second project to begin to group those under the state's law to provide you with a chart of what we would recommend would be the issues that Your Honor would address in looking at the remand motions.

THE COURT: Let's do that within 10 days. I do appreciate the offer to do the second. I would be interested in your input. You are closer to the states. I would like to have your views about some grouping, and in that grouping there are going to be some common issues. I can take up a particular case and focus on those common issues, then apply that ruling to the other cases. I won't have to deal with the same issues 200 times. Hopefully I can get it down to less numbers than that.

MS. BARRIOS: Exactly. Your Honor, the response from the state attorneys around the country has been incredibly

positive and complimentary to Your Honor looking at this issue so early on in the MDL litigation, and so many of them have asked me to express that appreciation to you.

THE COURT: I'm aware that this case has been going on for some period of time in the states. It's different than in some of the other MDLs where the states get their cases about the same time that the MDL transferee gets its case and so it doesn't present a problem. This is a little more complicated by the fact that some of the states have been working on these cases for some three or four years now. That needs to be plugged in and taken into consideration. I appreciate your work, Ms. Barrios.

MS. BARRIOS: Thank you, Your Honor. Your Honor, Ms. Kathryn Snapka of Texas is here. She is prepared to address the Court, either formally now or informally after, on her Garza remand.

THE COURT: On the what?

MS. BARRIOS: The Garza remand.

THE COURT: Okay.

MS. BARRIOS: Your Honor, if I may, I would like to approach the bench with your copy. I have provided copies already to plaintiff and defense.

THE COURT: Fine.

MS. SNAPKA: Your Honor, Kathryn Snapka, plaintiff's attorney for the Garza case. The Court graciously heard this

matter in chambers after the last status hearing. We had an emergency motion for remand. To remind the Court, this is the case that was filed in early 2003, removed, remanded back to the state court, and then removed again immediately before the February 14, 2005 trial setting. We had filed an emergency motion to remand with this Court.

The one thing I wanted to bring up to the Court that is slightly different than the last status conference is the Texas legislature, after trying valiantly in special session to accomplish some goals, failed to do so. It is no longer in special session. Therefore, any legislative impediments would be out of the way. We would respectfully again request the Court to return this case -- the doctors, as well, which has already been remanded to the state court by federal court -- back. It was trial ready when it was removed and remains trial ready to this day. If the Court wishes to hear additional argument, we stand ready at any time to present that to the Court.

THE COURT: I'm reviewing that now. If I do need argument, I will let both of you all know and will give each side an opportunity to address it.

MR. WITTMANN: We would like to have an opportunity to do that, Judge.

THE COURT: Yes. Anything on tolling agreements?

MR. BIRCHFIELD: I'm not aware of any issues with the

tolling agreement. We would just like to remind all the attorneys that the forms for the tolling agreement are available on the Court's web site.

THE COURT: We talked about this several times. The question that's raised in the tolling agreements is whether there is an effective way of tolling the cases so that expense does not have to be incurred in filing particular cases. There are certain agreements that can be entered into. Our state does not because it's a civil law jurisdiction perhaps. In any event, the state law doesn't really clearly approve tolling agreements, so you may have to do that by a different method. The concept is that the cases are suspended and do not have to be filed at the current time. This helps, hopefully, both sides and also helps the clerk's office wherever these cases go.

MR. WITTMANN: I would just like to ask, Judge, that the lawyers who have clients who are using the tolling agreements pay particular attention to get the authorizations attached to the plaintiff profile forms, get those completed properly, take a few minutes to do it and try and get the forms completed as much as they can. We are getting some in that are really not very well done. Most of them are okay, but some are coming in kind of sloppily done.

THE COURT: Yes. That's essential because the tolling agreement, while it's good for some aspects of the

case, the problem is it sometimes interferes with the accurate census of the case because you don't know who's out there, so to speak. So we have tried to bridge that gap by having a form filled out by anyone who is interested in partaking of the tolling agreement. This at least alerts everyone as to your whereabouts. That will help you, also, because as the case goes on everyone will know of your interest and your presence. I urge it be done. If you have any problems with it, then bring it to the Court's attention and I will require it to be done within a certain period of time or the case will be dismissed.

MR. WITTMANN: I will, Your Honor.

THE COURT: Louisiana master complaint.

MR. WITTMANN: I've drafted the Pretrial Order governing the Louisiana master complaint. Mr. Meunier has given me his comments. I have given him my comments on his comments. I think we are pretty close to a final version.

THE COURT: Would you tell us why we need a master complaint and what's involved.

MR. MEUNIER: Jerry Meunier for the PSC. As you alluded to, there is at least an argument that can be made that Louisiana claimants would not be protected by a tolling agreement. For that reason, we have been negotiating with Merck for the filing of a Louisiana joint complaint, which will set forth by name each plaintiff who is eligible to be in that

complaint. We intend to put these plaintiffs on the same footing as those non-Louisiana plaintiffs will be protected by the tolling agreement.

I do want to emphasize and as Mr. Wittmann indicated, we should have a Pretrial Order submitted to the Court within the next couple days to govern this, but we will be sending to Louisiana counsel a letter that alerts them to the availability of this vehicle. We are aware of the late September anniversary date for the withdrawal of Vioxx, which has potential implications on the statute of limitations in Louisiana. I do want to emphasize, though, for those who are here that like the tolling agreement -- and, again, pursuant to the equivalent footing idea -- the plaintiffs who are eligible to be in the Louisiana joint complaint must have a cardiovascular event, that is, a heart attack or ischemic stroke.

There is going to be the same process that's in place with the tolling agreement. After their name, they will be required to fill out a profile form. Merck will have an opportunity to review the records. If Merck feels that they are not cardiovascular event cases, there will be some motion practice. During that period of time, Your Honor, the time limit on the statute of limitations will not be running, but there may be some opportunity then for Merck to delete certain people from the joint complaint, which just like the tolling

agreement they will have to be filing separately.

THE COURT: We ought to have some kind of notice that goes out. I'll put it on the web site so that everybody has knowledge of that so that they know the advantages and potential problems they might have.

MR. WITTMANN: We will do a proposed Pretrial Order, Your Honor.

MR. MEUNIER: In addition, Judge, we can submit a proposed notice for you to put on your web site.

THE COURT: I think that's a good idea. The next item is state/federal coordination, state liaison committee.

MR. BIRCHFIELD: Your Honor, when do you want that on the Louisiana --

THE COURT: Can you get the notice to me within 10 days? We have a short fuse on that prescriptive period, and I would like everybody to know it.

MS. BARRIOS: Yes, Your Honor. Dawn Barrios again. We will be more than happy to put that information, also, out in the state liaison committee newsletter that we send. Since the last status conference, we have sent out two newsletters and, as I indicated earlier, had a tremendous response. We have been invited to speak at the Mealey's conference to present the MDL status, and we are actively seeking out all different professional conferences so that we can make a presentation on the status here.

We have had regular communications with the plaintiffs' steering committee through Mr. Davis and Mr. Arsenault and with Mr. Wittmann's office. Your Honor, if I might ask Mr. Wittmann when he provides the plaintiffs' steering committee with a list of all these class actions that he provide our committee with it, as well, particularly the state class actions. We have been getting inquiries from different states to see if there's a pending class action for statute of limitation purposes. If we could get that information, we would appreciate it.

THE COURT: Let's do that, Mr. Wittmann.

MR. WITTMANN: We will.

MS. BARRIOS: Thank you.

THE COURT: The state liaison committee is very significant in a litigation like this. One of the challenges in MDL is that it's a dual-tracked situation. In a federal court, there's the MDL. All of the cases in federal court are assigned to a transferee judge and the transferee judge handles them in a coordinated matter. In addition to that, there are numbers of cases that are filed in state court. It seems to me that there's an opportunity for coordination so that the states can have the benefit of the MDL and the MDL can have the benefit of the states. It only works if the people who are on the state committee and the MDL committee are willing and interested in working together to help each other process the

cases.

I'm particularly appreciative and congratulatory of the state committee. We have appointed some excellent folks on it. They have risen to the challenge and done a great job. I have increased the membership on it by Mr. Leonard Fodera. Mr. Fodera, would you stand up. I'm going to be issuing an order appointing Mr. Fodera to the committee. He is from Philadelphia. He is very well-qualified and highly recommended. I look forward to working with you on it, sir.

MR. FODERA: Thank you, Your Honor.

THE COURT: Again, thanks to the committee, and I urge you to continue to work together.

MR. BIRCHFIELD: Your Honor, on behalf of the plaintiffs' steering committee, I would also like to extend our appreciation to Ms. Barrios and the entire state liaison committee for the tremendous work they have done on the remand issues and on coordination and communication. It's been a tremendous help and we appreciate that.

THE COURT: I think it works if the committees coordinate with each other. If the committees get out of sync or one resists some of the movement of the other, I think it then breaks down and presents problems. It only works if you coordinate and work together. If you have any difficulties, bring it to me. I will resolve it. Any pro se claimants?

MR. BIRCHFIELD: Your Honor, we are not aware of any

new requests, but the PLC continues to handle those claims as they come in, directing them to attorneys in their appropriate state.

THE COURT: The next come is the MDL assessment. How is that being received?

MR. BIRCHFIELD: It has been received very well, Your Honor, from all the feedback that we are aware of. I would also like to remind everyone that the full participation option agreements are on the Court's web site and can be accessed that way. We have gotten a tremendous response and it's been well-received nationwide.

THE COURT: These cases are very expensive to handle. I think it is to the benefit of everybody if they participate in the expense and also have an opportunity to participate in the work. The case has to be run by committee, but the committee ought to have an opportunity to tap people who are outside of the committee so that they can work through the committee on the MDL. Anybody out there who is interested in working, you need to contact the committee. They are willing to give you an assignment to work. It has to be funneled through the committee, but I'm interested in your work. Your work will be compensated for. It will be to the advantage of everyone and also to your own advantage. I urge anybody who is not on the committee who is interested in working to let the committee know and you will be put to work. There's enough

work out there for a lot of folks.

MR. HERMAN: Thank you, Your Honor.

MR. BIRCHFIELD: Your Honor, before you set the next status conference, I would like to offer my apologies. I see there is a large audience. For those who came expecting a Shakespeare quote from the plaintiffs' spokesperson, I humbly apologize for disappointing them.

THE COURT: The next meeting is Thursday, September 29, 9:30. I will be meeting with liaison counsel at 8:00 that day. Anything from anybody? Any other comments? Thank you very much. The Court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, the Court was in recess.)

* * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Toni Doyle Tusa

Toni Doyle Tusa, CCR
Official Court Reporter

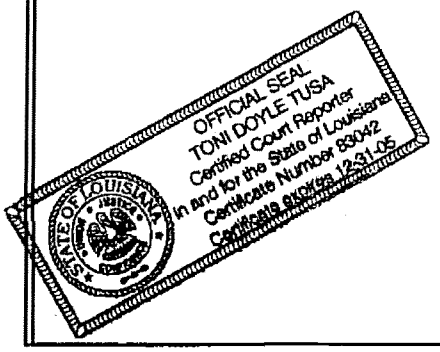

Exhibit L

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UNITED STATES DISTRICT Court
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION * MDL NO. 1657
*
* JUDGE FALLON
* * * * * * * * * * * *

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL CONFERENCE HELD IN THE ABOVE-CAPTIONED MATTER ON THURSDAY, THE 27TH DAY OF OCTOBER, 2005, BEFORE THE HONORABLE JUDGE ELDON FALLON IN THE JUDGE LEE H. ROSENTHAL COURTROOM, 515 RUSK, HOUSTON, TEXAS.

APPEARANCES:

FOR PLAINTIFFS:

RUSS HERMAN
RICHARD ARSENAULT

FOR DEFENDANTS:

PHILIP WITTMANN
DOUG MARVIN

REPORTED BY:
NANCY LAPORTE
CERTIFIED COURT REPORTER
STATE OF LOUISIANA
(504)495-1692 (for transcipt orders)

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JUDGE FALLON:
Call the case, please.
CLERK WYNNE:
MDL 16567. In Re: Vioxx Products Liability Action.
JUDGE FALLON:
Counsel will make your appearance for the record, please.
MR. HERMAN:
May it please the Court, good morning, Judge Fallon. Russ Herman for the plaintiffs.
I have Mr. Wittmann's agreement to surrender.
MR. WITTMANN:
I would like to put this on the record, Your Honor.
It's an agreement with Mr. Herman to voluntarily surrender. It's an understanding in the near future the Court will sign an order that requires him to surrender to an institution to be selected by the Bureau of Prisons for the Department of Justice. The agreement is he will report voluntarily surrender under the order, and his

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failure to appear will be punished by a fine, imprisonment, or both.

MR. HERMAN:

By stipulation, Your Honor.

JUDGE FALLON:

I will have both of you-all there.

We are here for the monthly status report back in Houston. I had hoped we could move back to New Orleans, but we are not there yet. Hopefully we will be there soon.

The first item on the agenda is LexisNexis File & Serve.

Anything there?

MR. HERMAN:

May it please the Court, we've had several hundred calls from attorneys who have served the Plaintiff Profile forms, hard copies, on Mr. Coronado. Mr. Wittmann however can't upload to LexisNexis because of the backlog of a large number of cases being filed in MDL. Mr. Wittmann and I have reached agreement that service on Mr. Wittmann and Mr. Coronado of hard copy will suffice for now, and when the clerk's office can handle

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the large influx of MDL cases, at that time we will notify Plaintiffs' counsel to upload on LexisNexis.

JUDGE FALLON:

This is not a Lexis-Nexis problem. This is a logistical problem created by the hurricane?

MR. WITTMANN:

Yes. With the Clerk's office, Your Honor.

JUDGE FALLON:

I will talk to the Clerk's office and see whether or not I can expedite the matter.

The Clerk's office is moving back to New Orleans. Hopefully they will be established there very shortly. I will talk to them, if I have to, this week.

MR. WITTMANN:

One other thing in connection with those documents. If from now on people who are filing Exhibit As or Bs or Cs, in connection with the tolling agreements, should send them to our office in New Orleans. We were operating out of our Baton Rouge office

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for the past two months, but have transitioned that back to New Orleans effective today. We put a notice to that effect on File & Serve, as well. We wanted everybody here to know we are operating out of the New Orleans office in terms of this case.

JUDGE FALLON:

Next item is the orders issued as a result of the hurricane.

Any comment on that?

MR. HERMAN:

Various orders have been issued by the presiding judge of the Eastern District, by the governor of Louisiana, and now by the Louisiana Supreme Court as regards statute of limitations or prescription in Louisiana and statutes of repose. The Law Institute has now suggested some amendments to the Louisiana Civil Code, which I think will only be binding on Louisiana cases; nevertheless, counsels have concerns that any of these orders may -- have concerns none of these orders will affect the statute of limitations issues in the MDL.

MR. WITTMANN:

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I think we agree with that. I think the Louisiana legislature is going to have a session starting November 6th to consider some of these problems. I think the legislature can deal with it effectively.

JUDGE FALLON:

The third item is State Court trial settings.

MR. WITTMANN:

Yes, Your Honor.

The Humeston case is underway, as you know. The evidence is closed. The case will be argued to the jury tomorrow, and the verdict will be read when it comes. We've got the Zajicek case, if I am pronouncing that right, set for trial March 20th in Jackson County, Texas. The Guerra case is set for trial on April 17th, 2006, in Texas District Court of Hidalgo County, and the Kozic case set for trial in Hillsborough County, Florida.

JUDGE FALLON:

Let me comment about the cases. I said this several times before, but I will reinforce it this time. This MDL Multi District

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Litigation concept is a concept that was created to deal with multi-district cases. This particular case is a multi-district case. Suits filed throughout the country. We have now about 148 class actions filed in every state in the union, and it looks like that the census will bear the prediction of the attorneys that there will be about another hundred thousand claims. The MDL is particularly suited to deal with a case of that type. It's an opportunity for the lawyers to have one proceeding and develop all of the discovery in that particular proceeding. It's good for the litigants. It's good for the plaintiffs and the defendants -- litigants in general. A problem that has developed over the years, which continually poses a challenge to the MDL is to begin trying cases as quickly as possible. In this particular case, I have been able to do that because the case has been filed for several years before the MDL was

created.
There are many cases that are
ready for trial, and they are being migrated
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here so that I can begin trying them. We try
a case in three or four weeks. The first MDL
case will go for trial. I set dates in
February, March, April, and May for other
cases to go to trial. It's helpful, I think,
if the cases go to trial in this forum. If
they go to trial in this forum at the end of
April; hopefully, we will have an opportunity
to sit down on both sides. I will sit with
both sides and make some sense out of what the
juries have been doing with these cases.
Hopefully, out of that discussion will come
some programs to resolve the entire litigation
without the necessity of trial in every
particular case. That's the aim of the MDL,
or at least one aim of the MDL. The primary
aim, of course, is to create a forum for
discovery.
In this particular case, we might
also have another opportunity, because the
cases are not only ready to be discovered;
they are ready to be tried. I want to give
the parties a forum to do that.
We've selected categories of
cases that are representative of all of the
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entire census of the case. If we now select
cases that are representative of each of those
categories, we will have some intelligent way
of looking at the entire scope of the case. I
think that opportunity is not there if you try
hundreds of thousands of cases one at a time
throughout this country and throughout the
State Court system. The parties, the
litigants are different. The lawyers are
different, and you don't have the opportunity
to look at a body of cases which we have in
the MDL.
So, I know there's an interest
always in looking at State Court as an
opportunity to try cases, but I suggest to the
parties that I am interested in trying to move
this case forward in the MDL format.
I am concerned that I am getting
information from the press and others that
indicate that there's a move afoot to work
outside of the MDL. I think that is
counterproductive to the litigants. I think
that is counterproductive to the lawyers, and
I am going to be particularly conscious of
that happening, and I am going to look at
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ways, both informal as well as formal for
moving this case through the MDL process so
that we can get a prompt resolution of the
entire litigation and not have this linger for
years. I think the best way of doing that is
to try some cases in the MDL, so that's what
I'm doing.

MR. HERMAN:
Your Honor, Mr. Kline and Mr. Balefsky for the Plaintiffs, and Mr. Marvin for the defendants have had some discussions. Any argument on these issues, Your Honor, is reserved following the status conference.
JUDGE FALLON:
I will take that up following the status conference. Again, as I mentioned just a moment ago, parties met at my direction. They met and selected categories. The categories, the entire census of this litigation, fall into several categories. It makes sense to me now to go forward and pick cases that are representative. First that are ready for trial. I don't want any cases that are not ready for trial. They are not going

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to be helpful to us. The purpose of trying the cases is to get information for the parties to deal with. They must be ready, and they must be representative of that category. If they are ready and representative of that category, we should try them and see what juries -- how juries deal with that issue. The first thing is to pick the categories. That's been done. Now we are at the stage of picking the cases. I will talk with the parties at the appropriate time on that issue.
The next item is class actions.
MR. WITTMANN:
On class actions, we've got several motions pending on class actions. The defendants filed a Rule 12 motion to dismiss on the personal injury complaint and the purchase claims complaint. Those have all been fully briefed. Plaintiffs filed a motion to stay of class briefing on the personal injury complaint, and they filed a motion to amend the master class action complaint for medical monitoring and personal injury by adding some class representative.

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All of those motions have been fully briefed and are ready to be argued, and Merck requests they be set for argument at the earliest practical date.
JUDGE FALLON:
Let me hear from the Plaintiffs.
MR. KLINE:
Mr. Wittmann's only half right. The Rule 12 motion on the personal injury complaint and the purchase claims complaint, the Plaintiffs' response is due November 8th. The other three motions: The motion to strike with regard to headless classes, the motion to stay to mature the tort, and the motion to amend to add plaintiffs for the headless classes are ready for determination, those three.
JUDGE FALLON:

I will set those by minute entry.
I will give you a date.
Discovery directed to Merck?
MR. HERMAN:
Yes, Your Honor.
I want to thank Arnold Levin and
Liz Cabraser who have done an excellent job in
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charge of our Class Action Committee.
There are several discovery
issues, Your Honor, that are pending. One has
to do with prioritization, and we have a
letter for counsel opposite we will deliver
today setting forth priorities.
The privilege log issue is still
an issue of contest, even though there are
certain issues that have been resolved by meet
& confer, and we can take those issues up
after the status conference. A proposed order
on the Arcoxia and foreign discovery should be
in a form to present to Your Honor. The date
of production of that discovery is still being
discussed, and hopefully that can be resolved
today. The other discovery issues are further
on the agenda.
MR. WITTMANN:
I don't have anything to add to
that, Judge.
That sort of segues into the
next, which is the request for the production
of FACTS database, which is on target. We
said we would produce in accordance with the
Court's order, and it's ongoing.
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JUDGE FALLON:
The next item is Vioxx
professional representatives. I made a ruling
on that. How's that working?
MR. HERMAN:
It's working fine. Today I have
with me the Bates stamped list. I have
assignments for each PSC member. I returned
the original list to the Court, along with an
assignment list that shows each PSC member's
assignment. It's clear to the PSC, and Your
Honor made it clear that only PSC members and
their staffs will have access to the list
which I am distributing, and they may not be
disseminated to non-PSC representatives.
JUDGE FALLON:
That's clearly the intention of
the Court.
MR. WITTMANN:
I am going to submit a clarifying
order to Your Honor to make that perfectly
clear.
JUDGE FALLON:
Do that.
The discovery directed to the
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FDA.
Any problems with the FDA?
MR. HERMAN:

No problem, sir.
JUDGE FALLON:
I appreciate their cooperation.
It's very helpful.
MR. HERMAN:
Thanks to Mr. Tici and
Mr. Rafferty for doing an excellent job.
JUDGE FALLON:
Discovery directed to third
parties.
Any issues there?
MR. HERMAN:
I received a letter.
JUDGE FALLON:
Discovery directed to third
parties?
MR. HERMAN:
Yes.
Mr. Tici received a letter from
Victoria L. Vance of the Cleveland Clinic
Foundation, in which the Cleveland Clinic
Foundation attempts to delay October

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depositions to December, well past the
beginning of the Irvin case. We have been
unable to resolve that, Your Honor, and we
would like to issue subpoenas from the MDL,
and if the Cleveland Clinic Foundation
persists, its general counsel persists in not
making the deponents available for deposition,
we would like the subpoenas enforced by the
MDL Court.
JUDGE FALLON:
Let me comment on that.
I want the parties who notice
depositions, particularly noticing doctors'
depositions, to first contact the doctors or
their representatives, and see whether or not
it can be done at a time convenient with their
schedule, as well as with your schedule. I am
aware they are busy. I am aware they have
matters on their agenda, but having done that,
if that is not workable, then you should
subpoena the doctors at a date and time that
is convenient with you. Subpoena them and
bring the subpoenas to my attention.
I expect the doctors, or anyone,
for that matter, but in this case, the

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doctors, to be present at the time that is
required by the subpoena. If they are not
there, I will convene a meeting to show why
they should not be held in contempt of Court.
I will do it either here in Houston. I will
do it in New Orleans, or I will do it at their
particular place of residence, wherever that
might be.
The MDL Court sits throughout the
country, and I will do that. If they violate
a subpoena, they will have to explain it to me
and not to counsel.
When a subpoena is issued, it is
issued with the full power of the United

States Court and the United States Government, and I expect them to be present at the deposition. I'll also send a copy of this comment to the attorney, Ms. Victoria Vance, at the Cleveland Clinic Foundation, 1950 Richmond Road, Cleveland, Ohio, 44124.

MR. HERMAN:

There is one other scheduling matter, which Mr. Wittmann and I will argue after the status conference, regarding the detail of depositions. Mr. Robinson chairs

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our committee. Mr. Lanier, Mr. Arsenault are also involved in the detail at issue, and we reserve that argument until after the conference.

JUDGE FALLON:

Plaintiff Profile forms and Merck's --

MR. WITTMANN:

As Russ mentioned, there is a delay between the final entry on the written transfer orders and the actual docketing of cases in the MDL. The delayed cases won't have access to File & Serve until docketed into the Court. There have been questions raised when the Plaintiff Profile forms should be filed. I have routinely been saying, "Don't worry about the November 15th date. Just do it on December 15th, and we will be happy." That seems to work, and we will continue to do that.

I want to point out to counsel present, and whoever may be on the telephone, if anyone is on the phone this morning, that we are getting some problems with the completeness of both the Plaintiff Profile

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forms and the Tolling Agreement forms. For example, in the Plaintiff Profile forms, we have 127 forms we received are just incomplete, based on the standards outlined in Pre-Trial Order 18B. Actually, only about 19 of the Plaintiff Profile forms have the requisite information that Merck needs to do the most basic queries of its databases and systems.

Mr. Herman asked to be furnished with a copy of our deficiency letter, and we have been doing that. We sent a deficiency letter to each counsel who got a form that is incomplete or inaccurate for some reason. We will in the future send copies of all of our deficiency letters to Mr. Herman. I want to urge the lawyers filling in these forms to give them attention and fill them in accurately in the first place. We can't do our job of getting the Merck profile forms prepared if we don't have accurate information from the Plaintiffs going in.

JUDGE FALLON:

I want to give everybody an opportunity to ask any questions, fill out any

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forms. If they are not certain, call liaison counsel. Ask them about it. It's important that you get the forms filled out correctly, because that's the first step to this discovery process, at least on that phase of the case. Then Merck has to respond in a certain period of time thereafter, and they are not going to respond until they get the form filled out properly.
If after sufficient time, sufficient cajoling and sufficient encouragement, the forms are not filled out, I will entertain a motion to dismiss the particular case for failure to comply with discovery. I won't do that immediately. I'll give an opportunity to the parties to try to work it out to urge them to fill it out and give them an opportunity to fill it out. If it's not filled out properly after a certain period of time, we will instruct the Defendants to file a motion to dismiss that particular case.
MR. HERMAN:
We appreciate Defendants' willingness to send copies of the deficiency
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letters. More importantly than that is if the defense would outline for us the major technical objections and the major substantive so we can concentrate on that and at least provoke some responses as to those major issues.
MR. WITTMANN:
We can do that.
MR. HERMAN:
Thank you.
JUDGE FALLON:
Remand issues.
MR. HERMAN:
None at this time, Your Honor.
JUDGE FALLON:
Tolling agreements.
MR. HERMAN:
As Mr. Wittmann indicated, the extension of time that Mr. Wittmann has agreed to is December 15th, 2005, and if there are any further problems, they can contact Mr. Wittmann in this regards, the Plaintiff Profile forms used in connection with Tolling Agreements.
MR. WITTMANN:
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That's correct.
JUDGE FALLON:
The next item is State and Federal coordination with the State Liaison Committee.
MS. BARRIOS:
Good morning, Your Honor.
The State Liaison Committee continues to be in contact with the Plaintiffs' Steering Committee, particularly

through Mr. Arsenault, Mr. Levin and Mr. Davis. We have worked diligently on the remand project you ordered us to complete, and I would like to thank all involved with that project, to members of the State Liaison Committee -- actually to members of your staff -- Mr. Wynne has been particularly helpful, your docket clerk, assisting us in getting materials from PACER, and several attorneys who aren't members of the State Liaison Committee gave us a hand sending us their remand pleadings.

I have prepared Your Honor today for the Court, I have given the Plaintiff liaison counsel and Defense liaison counsel a

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copy of a binder. That binder is divided into states. It lists all of the remand cases; the ones which have already been decided, the ones which are pending before Your Honor, and we broke down the various issues that you might address those issues when you see fit. There are various patterns that emerge from California with the parties naming McKesson as the defendant, to the usual naming of doctors, healthcare providers, pharmacists, sales representatives.

We are also, Your Honor, in the process of preparing a CD-ROM which will have it all hyperlinked for you, because of our temporary offices, we were unable to burn that for you today, but with your permission, I will deliver it to your chambers in New Orleans on Tuesday when you are back, and I will provide copies to both liaison counsel, as well.

JUDGE FALLON:

That will be fine. We will receive that.

MR. HERMAN:

Your Honor, I have one comment.

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I want to thank Dawn for doing her usual, very competent job, and Richard Arsenault for helping her coordinate.

There have been some resignations from the State Liaison Committee. We would like the opportunity, Your Honor, for the PSC to meet after our business today in the jury room so we can offer Your Honor some potential names for service on this committee.

JUDGE FALLON:

When you do that, let me also say, Ms. Barrios, I appreciate your work on this matter. I create a State Liaison Committee, and I am in favor of the concept -- I think that a State Liaison Committee can play an important part in coordinating the litigation, the federal litigation with the states, and when we reach the point where the matters clarify a bit when we get experience and are able to look at it, the state cases can hopefully be resolved short of trying

every case. That is my hope. That is what I am working toward.
My concern, however, is that people who may not be on the State Liaison

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Committee can utilize the work that the State Liaison Committee is doing, and the access that the State Liaison Committee has in the process to either derail or to make problematic the process, the MDL process, and I am concerned about it in this particular case.
I don't know at this point whether there is any particular action, but I am hearing a lot of words, that, to me, indicate that there is some potential move afoot to inhibit the MDL process from proceeding in an expeditious manner, and I may have to rethink the position and the role of the State Liaison Committee. I am not there yet.
I urge that the Plaintiffs submit to me names of individuals who want to participate in the MDL process; not individuals who want to participate outside of the MDL process. If they are willing to participate inside of the MDL process, I welcome them. I will make every effort to make their lives easier in their vineyard. But those who are not, I will

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deal with in a different manner.

MS. BARRIOS:

Those members remaining on the State Liaison Committee are committed to make this the most successful MDL we possibly can. We reach out constantly to other members of the bar. We had obviously been aware of the press report that you reference, and I have met in person and talked on the telephone to the people I think who are the most prominent members of the Texas bar. Each and every one of them is committed to do everything they possibly can to coordinate with the MDL. I have today, Your Honor, a copy of Judge Wilson, who is the Texas MDL judge, his most recent case management order, and that case management order is very telling, because it directs the parties to coordinate with your MDL. He no longer is quashing any depositions that are cross noticed. If there is a Federal MDL deposition that's taken of any deponent, a Texas litigant may not retake that deposition absent Court order. He is falling into place behind Your Honor. He has adopted your MDL Plaintiff Fact sheet requiring that to be used

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and all of the authorizations. I commend Judge Wilson as well as the PSC and Mr. Fibich who appeared before Your Honor in the past who noticed counsel for the Texas MDL, and report to you there is a cohesive group of the most prominent Texas attorneys who are still in the

same position they were a month ago, and that is to coordinate and assist the Federal MDL in any way possible. They've asked to assist with depositions. They've asked us to coordinate dates of depositions. Mr. Arsenault was present at that meeting, and he pledged to do so between the PSC and the Texas MDL. There are numerous instances in this order, and I would like to hand it to Mr. Wynne to provide it to Your Honor so that you can be assured that the Texas MDL is right behind Your Honor in prosecuting the case.

JUDGE FALLON:

I appreciate Judge Wilson's willingness to work with the MDL. That's very meaningful to me. I will do everything possible to make his journey in this type case easier for him. We've plowed some ground. We

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will make any work product that I have generated or that has been generated in the MDL available to him for his use, and I do appreciate his help in this regard.

MS. BARRIOS:

Your Honor, the last matter is one of a message that Kathy Snapka, who has the Garza case in the remand pending before you, she is in trial today. She called me last evening to extend her apologies for not being present today and to ask the report to remember the Garza motion before Your Honor.

JUDGE FALLON:

I have it, and I am working on it.

MS. BARRIOS:

Thank you, Your Honor.

JUDGE FALLON:

The next item is proces claimants.

MR. HERMAN:

There is one more issue on coordination. Ms. Cabraser of the PSC has been contacted by the Canadian counsel, Canadian Court, and will provide Your Honor

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with the name of the presiding judge and contact information and also whatever information she has on the attorneys that are proceeding with that.

JUDGE FALLON:

I would like to get the judge's name and his telephone number, and I will contact him, and I will be happy to work with the Canadian judiciary on this matter. There also have been some cases filed, I understand, in Great Britain and maybe Italy or France. I am not sure we heard from any of those folks yet. Anything on that, Mr. Herman?

MR. HERMAN:

Liz, why don't you step up.

MS. CABRASER:

Your Honor, there has been some activity with respect to foreign claimants, both overseas and in the U.S. courts. We are trying to sort that out. I think there were some complaints filed in connection with the New Jersey proceedings. We don't know what the outcome of those will be, and there has been discussion of filing cases in overseas

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fora, most notably Great Britain, and perhaps elsewhere. We will make every effort to apprise and report to Your Honor on the status of those proceedings so that any appropriate coordination initiatives can be implemented.

JUDGE FALLON:

Thank you.

MR. HERMAN:

With regard to proces claimants, Your Honor, we continue to communicate with and notify the proces claimants of their rights. As is our usual practice, we advise them they should seek counsel, and we have given them the names of the attorneys who have cases pending in the MDL in their particular venue and jurisdiction for contact should they desire to do so. They have also been informed of the Court's website, and that these conferences and status conferences are posted for their information. If we receive a specific request for specific information, we have responded. We have not, however, had -- there's been a dearth of request for specific information.

JUDGE FALLON:

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Anything else we haven't taken up?

MR. WITTMANN:

No, Your Honor. You might want to announce the date for the next status conference.

JUDGE FALLON:

What's the --

MR. HERMAN:

December 1st at 1:00.

JUDGE FALLON:

December 1st at 1:00 here in Houston. I will be trying the first Vioxx case that week, the first week of the trial, and I will take some time out and hold this meeting. I will begin the general meeting at 1:00. I will meet with liaison counsel at 12:00.

MR. HERMAN:

Your Honor, may we have access to the jury room after you conclude your business today?

JUDGE FALLON:

Certainly.

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MR. HERMAN:

Your Honor, that ends the status

conference. There are several matters for argument.

JUDGE FALLON:

All right. We will take a five-minute recess.

(Brief recess.)

JUDGE FALLON:

We have three motions to take up. Let's talk about the motion to compel on the privilege log.

MR. HERMAN:

Your Honor, I asked Richard Arsenault to argue for the PSC. He and Drew Ranier have been involved.

MR. ARSENAULT:

Your Honor, Richard Arsenault for the PSC.

Your Honor, in preparing for this argument, I tried to go through the documents that Your Honor was provided with. We had a meet & confer regarding this in New York several weeks ago. We provided Your Honor with a transcript of that. Following that

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there was a Plaintiff report to provide Your Honor with some additional details regarding the dispute. There was a Defendant report. That was followed with our motion to compel, which was followed by the Defendant's opposition, our reply to that opposition, and last night we received the Defendant's surreply.

We anticipated this problem three months ago. We sent a letter, and that's attached to the transcript that was part of the meet & confer we had in New York. We anticipated this very problem three months ago. We sent -- when I say "we," Mr. Herman sent a detailed letter, some 20 pages anticipating this very problem. I would like to go through three or four of the key issues there.

We first brought to their attention we reviewed the logs that had been produced in New Jersey and wanted to bring to their attention those which were problematic. We specifically advised them that if these were going to be produced in the MDL, they would be insufficient. We specifically

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indicated that those logs would not satisfy the requirements of Federal Rule of Civil Procedure 26b5, and attached to the letter, we gave some very specific examples of why those would not be in compliance with Rule 26.

JUDGE FALLON:

They say now they are in the process of doing that.

How do you answer that?

MR. ARSENAULT:

The problem with that, Judge, is we are just weeks away from a trial. We asked for this three months ago. Their offer last

evening to -- I think the term is "re-review" or "dedesignate," is much too little and much too late. This is going to be of no assistance to the people trying the case in a few weeks from now. These documents need to be looked at. If they are discoverable, these are items that should have been given, perhaps, to our experts. They could have been used in depositions. They could have been used in connection with Daubert practice. They could have been used in connection with expert reports. It's too little too late.

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We pointed out all of the case law with regard to what is required in the initial letter we sent to them three months ago. We sent them examples from Professor Rice's text on the kind of descriptions that you need in these things. I think we've done all we can, and we've briefed this early. If Your Honor has any questions, I will be happy to answer them.

JUDGE FALLON:

Let me hear from the other side and talk with both of you-all.

MR. MARVIN:

Let me provide a few points of clarification on the history here. The timing of the letter that Mr. Arsenault was mentioning was the very end of July, and in response to that correspondence, which concerned a number of different discovery issues, not just the privilege log, on August 19th, we advised Plaintiffs' counsel we were in the process of re-reviewing the documents that had been listed on the privilege log in the New Jersey litigation, and that as soon as we possibly could, we would be providing a

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revised list.

In the meantime, we did rely upon, fundamentally, the list used in New Jersey. But bear in mind, this is just discovery gearing up in the MDL proceeding at that point. We relied on the New Jersey list but advising Plaintiffs' counsel that we would be making revisions to that list.

JUDGE FALLON:

How do you deal with this problem about the case just coming up in a couple of weeks?

MR. MARVIN:

Well, Your Honor, that is a product of trying to move, I think, toward trial very quickly. I think the way we can deal with it is in the proposal we made last night. We are all going to be running 50 miles per hour to get done everything we need to get done for that first trial, but that is part of an accelerated trial process. What we are proposing is that the revised privilege log will be provided to the Court and to opposing counsel on Monday,

November 7th. We will begin a rolling
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production of the documents that are being released as a result of that re-review next week, and we will complete that production by November 11th.
And, Your Honor, I think with respect to, I believe at the last status conference, you mentioned the Court would have an interest in doing a random review of the documents. What we said in our briefing last night is that as soon as the log is in the Court's hands, we will get to the Court within 24 hours whatever random selection of documents It wishes to review. We will make the commitment to get that to you very promptly.
But this is not a process, Your Honor, of trying to withhold documents or anything. This is a process that we told Plaintiffs we would be going through. We have been trying to deal with this as well as the other priority document productions that Plaintiffs have sought, and admittedly this is a compressed process, but that is our proposal to deal with that.
JUDGE FALLON:
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So there are two issues before me: One is the general MDL discovery. That is an easier one to deal with than the Irvin case that is coming up in three weeks. That concerns me, because some of those documents may be germane, may be relevant, may be of interest to the Irvin litigants, and I am trying to deal with that aspect. What is the solution to that problem.
MR. MARVIN:
Your Honor, I think that, as I said, we will begin the production of any additional documents that flow out of that. I think that a couple of things I should note is that I am not -- I don't think it is fair to state at this point that there is a large number that are going to be of any great news to Plaintiffs' counsel. A lot of the production is going to be duplicative of materials that have been. We have done cross checks of documents that have been produced. In a large document production, people may have changed position over time, maybe several years of this production going on, and so some of these are documents we are releasing now
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Plaintiffs already have. I can't give you the precise percentages on this.
I think, Your Honor, the approach is we get them the documents as soon as we can, and we will need to respond, Your Honor, if there is follow-up and so on, which we are committed to do on these issues to make sure that gets done before the Irvin trial gets started.

JUDGE FALLON:
Let me talk to the Plaintiffs. How do I deal with this with the Irvin trial?
MR. ARSENAULT:
Quite frankly I am not sure, Your Honor.
JUDGE FALLON:
We have several thousand documents. We are talking about 50,000 documents, or thereabouts?
MR. ARSENAULT:
Yes, Your Honor. Certainly one of the options available to Your Honor is that they waive the privilege. Three months ago, very clearly, we

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indicated to them, and cited the Paps case out of the Eastern District and advised if we got the same log here we got in New Jersey, it would not comply with the federal rules, and we cited to them a number of cases that stood for the proposition that if we got the same kind of New Jersey log here, they would be risking waiving the privilege. That is certainly an option.
Another option we brought to Your Honor's attention is we've identified eight specific categories that we think are problematic and a corresponding list of Bates numbers of documents that fall into those categories which Your Honor or a designee or a Special Master or one of your magistrates might look at in camera to determine the efficacy of the privileges asserted for those categories, and perhaps Your Honor could make rulings category wide with regard to those. Those are some of the suggestions, but quite frankly, we worked very hard for three months now to get to a point to where we would be able to intelligently determine whether these privileges have been

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appropriately asserted, and we've gotten nowhere.
MR. MARVIN:
Your Honor, if I may, there seems to be an assumption operating here that there is a substantial problem with the list that was provided in New Jersey. As in any major document production, we volunteered to go through and tried to respond to the issues the Plaintiffs made to add to the log and also to go through to identify documents where we can that we believe can be released.
To suggest there has been some default here with the overall privilege log I think is absolutely wrong. This issue was raised with us at the end of July. In addition to doing everything else we have been having to do on the production front, we have worked on this issue. The solution of you release all of the privileged documents

doesn't help with respect to the Irvin trial. That makes it more of a problem.

JUDGE FALLON:

With the overall case, what I would do with the overall issue is that I

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would order the Defendants to produce, in camera, the documents that are privileged and designate them by the eight categories that you-all apparently feel they fit into. I would then have a Magistrate randomly select a representative sample from each of those categories and give it to me. I review that random sample, and if the Defendant, who has the burden, sustains the percentage of the 51 percent of the documents, then I would declare that area privileged. If the Defendant fails to do that, then I would deny the privilege. That would be a way of handling the general approach. It's not like looking at each document. I don't mind looking at each document if there is a reasonable amount, but I am not going to be able to look at 80,000 documents. It doesn't make sense to me.

My concern is the Irvin case. I don't know how to deal with Irvin and get them to have some feeling that they have done their due diligence looking at the documents. How do I deal with that? That's what I am struggling to find the solution to.

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Are there any documents that are more germane to Irvin?

MR. MARVIN:

Not that I am aware of, Your Honor.

JUDGE FALLON:

How about Plaintiff?

MR. ARSENAULT:

Obviously, Your Honor, there is no way for us to know that. We don't know what documents are in there. That is exactly why, Judge, three months ago, even before the privilege log was due, we anticipated this problem. We knew from the beginning of the MDL that Your Honor was going to tee up a trial early on. We wanted to get a look at those privilege logs early on and get some resolution.

Weeks before the privilege log was due we went into tremendous detail. We outlined the law. We gave them specific examples of the problems with the New Jersey log and said, "Please, don't send us that New Jersey log. It's inappropriate, inadequate and doesn't comply with Federal Rule 26."

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Despite that, here we are three months later, and all that has fallen on deaf ears to the detriment of what's happening in the Irvin trial.

MR. MARVIN:

Your Honor, I am a little puzzled. It seems to me there are several issues. The documents for which there is no claim for privilege going forward, they will have those documents next week.

JUDGE FALLON:

Let's do that by the 3rd, and I will hear from the parties by way of telephone on the 4th. Give me a conference, a telephone conference on the 4th, and I will decide what to do from their standpoint.

I want you-all to think about the Irvin case as well as the overall matter. The overall aspect I can deal with at least by procedure that I am comfortable with. I don't know how I will deal with that with the Irvin case.

MR. HERMAN:

Your Honor, may I be heard for a minute?

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JUDGE FALLON:

Sure.

MR. HERMAN:

I don't know what can be done about the Irvin case. It may be water under the bridge. I know we are entitled to a Federal Fifth Circuit privilege log. Now, maybe they can't get us a Fifth Circuit privilege log by November 3rd or December 15th or whatever, but the one thing that we would like the Court to rule on is that we are entitled to a true privilege log. When matters are set in camera, Plaintiffs play blind man's bluff. We don't know if we are dealing with a trunk or a leg of an elephant. All we have to go by is a privilege log that the rules require.

JUDGE FALLON:

I got the point. What is your situation with that?

MR. MARVIN:

Your Honor, that's what I was --

JUDGE FALLON:

I thought you agreed with him.

MR. MARVIN:

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We agree with that. We believe that the log that was produced earlier complied, but we are trying to make changes to it, to address issues Plaintiffs have raised and provide that by Monday, November 7th.

JUDGE FALLON:

That's what I need by that Thursday.

MR. MARVIN:

By the 3rd?

JUDGE FALLON:

The 3rd. That, and which documents are not being asserted privileged. We all know because we've been there. We've done that. When you are looking at logs, when you are looking at documents of

this nature, this number, you've got a staff of thousands to look it at, and when in doubt, they make it privileged. They are generally not lawyers. It doesn't mean they are not good, but it just means they are looking at it from a different vantage point. So when in doubt, they put a privilege on it. But some lawyers have to look at it and deal with it.
The privilege really is -- the

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focus has to be on the document, whether it seeks legal advice, whether it receives legal advice, whether it's acting on legal advice, whether it's passing on legal advice from one employee to another employee. That is what's necessary.
It can be waived. It has to be done by attorneys who are meting the legal advice. While the attorney is the attorney for the party, that information has to be confidential. It's hard to generalize and say that it's not necessary clearly for the attorney to sign the document. If it's information that is being passed on from one employee to another passing on legal advice that that person got from the attorney, that may well be covered. The fact that an attorney signs something does not mean that it is within the privilege. It has to be legal advice. It can't be commenting on the weather or something that is not significant.
We all know the scope of the privilege. We are not dealing with, at this point, whether it's admissible into evidence. We are dealing at this point whether it is

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discoverable, whether it has anything to do with an issue for defense in the lawsuit.
It's broader and a hard row to hoe for the person who's urging the privilege, but it is a privilege, and it is a legitimate privilege, and I recognize that. But you have to be descriptive, and if you are not descriptive, then I am going to say it is not descriptive enough. It's just discoverable. You've got to be descriptive.
I will talk to the parties, as I said, by phone on that Friday. Give me a copy of what you give to the Plaintiffs. That will be resolved one way or the other at that time.
MR. HERMAN:
If counsel will permit, Your Honor, if you would serve me and Mr. Arsenault who have carried the ball on this with those responses, I would appreciate it.
JUDGE FALLON:
We talked a little bit about the cases being set for trial. You wanted to say something for the record in this regard.
MR. HERMAN:
Your Honor, the Plaintiffs' and

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Defendants' committees have had some

productive discussion this morning with alternatives. We would like to have further discussion with Mr. Marvin and Mr. Wittmann about case selection. Mr. Kline and Mr. Balefsky are going to look into a suggestion that Mr. Marvin made and see if we can come to an agreement, and in addition to that, Mr. Marvin and I have discussed some Louisiana stroke and MI cases that I am going to endeavor to cull through with Louisiana attorneys and see which plaintiffs and which plaintiff physicians may be available for trial.

JUDGE FALLON:

As I said earlier on, we are at the stage where we have to try cases, and I am going to be trying cases. There is no question we are going to be trying cases shortly. One of the first steps, as I mentioned earlier, was to pick the categories. We are not interested in trying cases so that we can just keep trying cases, thousands and thousands and thousands of cases. We are not going to be here long enough for that. We

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have to begin this journey with the view that the purpose of it is to resolve those several cases. That's one purpose. But the other purpose has to be to see whether or not that can be productive to resolving the whole group of cases. That's what I am interested in in trying to give you information so that both sides can look at it in three or four months and say: What have we learned from this, and get something from it and see whether or not we can take a look at this whole group of cases with that intelligence behind us.

To do that, we need cases that are ready for trial. Even if they are wonderful cases and very descriptive and would be informative, if they are not ready for trial, we can't deal with that. The purpose is not to just hurry up and try cases. We have over a hundred thousand of them to do. You can't resolve it that way. I need cases that are ready for trial.

Who is best at that? The litigants. You folks who have been doing it. You have to know which cases are ready for trial.

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Also, I would hope you would know which cases are instructive. We don't want to try the case if it's the only case of its kind. What do you get out of that other than just a couple of weeks of trial? That doesn't make sense to me. I am looking to you-all to deal with that, but you've got to have a meeting of the minds on it. You can't say: I want to try the "X" case, and they say: If they want to try the "X" case, we don't want to try the "X" case, because they picked the "X" case because it's the best case for them.

We want to try the "Y" case. And the other side says the same thing about them. You have to listen to each other and talk it out. If you can't do it, then I will do it. My solution is not going to be as sound as your solution.
I felt this morning in talking with both sides that there was some renewed interest in trying to do that, and I would urge that be done.
When can I hear from the parties?
MR. HERMAN:
Next week, Your Honor.

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JUDGE FALLON:
Let's do that by Friday, too.
The motion to defer depositions.
The Merck employees. I think that is your motion.
MR. MARVIN:
Yes, Your Honor, it is. I believe there is correspondence before the Court that was issued, but let me very briefly note that Plaintiffs noticed depositions for seven Florida sales representatives, former sales representatives, in early November. The notices, I would note, Your Honor, are rather curious. If you look at the document demand that went with the subpoena or with the notice of the deposition, it refers to a request for information, in many cases about a plaintiff's prescribing physician, as though it were part of some particular case where this information was being sought. But the notice itself says that it's for purposes of all cases, and nowhere in the notice is there reference to any particular individual case for which the notice is being issued.
We are left with some confusion

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about what is the purpose of these depositions. Mr. Herman's response to Your Honor on this doesn't clear it up much. It says in there that the plaintiff in the scheduled trial was residing in Florida at the time of ingestion of Vioxx, referring to the Irvin case. "There is no reason to consider to continue those depositions whether they are taken in connection with the upcoming trial or otherwise." That doesn't exactly clarify it, either.
I think the point here is as follows: To the extent these depositions are intended to be used in the Irvin case, discovery in that case is closed. In any event, none of the sales representatives had anything to do with the Irvin case. They didn't call on any of the physicians that were prescribing to Mr. Irvin.
If they are not attached to that case, then the purpose is completely unclear at this point. What we are asking, Your Honor, is that, given the fact we are to be

focusing on getting ready specific trials, we believe that when it comes to sales reps, we

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ought to be doing the depositions of the sales reps who are involved in the cases that are scheduled for trial coming up to get those done. Those are related to a particular matter.
To be willy-nilly and just going out taking sales reps depositions, seven in Florida in this instance, really doesn't connect to anything that is of urgency in this case, and we think that is a rule that should be adopted as we are doing these in connection with the cases that are being scheduled for trial.

JUDGE FALLON:

I read the parties' comments.
The way I understand they are approaching this is they feel that you have urged learned intermediary and various other defenses that knowing what the representatives knew and who they told and whether or not they should have told or whether or not they should have said something differently is germane to those particular issues and those particular defenses.
You make the point -- it's a

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valid one -- that it's more instructive to find out what the sales reps of that particular case said or knew or could have known or should have said. On their side of it they say: Well, then the other aspect of the depositions are for credibility purposes to test that person. He says he knew something. If he didn't know something, everybody else knew it. He must have known, so that is a valid point, also.
It seems to me, and I am mindful of the fact that one problem in this particular issue is having to take the same depositions generally and then having to take the deposition specifically. That's adverse to the purpose of the MDL, but it's hard to rule that they don't have a right in the discovery process to take the depositions of somebody who may shed some light or that deals with an issue or a defense in a lawsuit, particularly a defense. It's a significant defense in all drug cases.
I think that the depositions are discoverable or appropriate and should go forward, but it seems to me that in scheduling

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the depositions, it makes more sense to me to begin taking depositions in those cases that are set for trial. I am not saying that I am going to rule that you can't take other depositions in other cases. That you are going to not be able to take the reps involved in other cases, but it seems to me that the way to start this is to take all of the reps

who are involved in the cases where we have the trial and then look at it. If you need to take other reps that are not in cases that are set for trial, that may be doable. It doesn't seem to be as urgent as the first ones.

MR. HERMAN:

If it please the Court, with all due respect, our perspective is very different. Very different.

We raised this issue in June. We indicated to the Defendants that we had not had the opportunity in any pharmaceutical case to destroy the learned intermediary defense, which is the most vicious defense. It's a defense that the Fifth Circuit adopted and written in concrete.

The only way to deal with that

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defense is to show that there was a nationwide directive by Merck to its detailers to subvert the truth to physicians, hospitals, and the medical community.

We sought detailer information as early as June. We finally got the detailer information. The original order that the Defendants consented to said they were perfectly willing to double track depositions. They have listed 300 law firms, 30 of them in this litigation. 30 law firms have appeared one way or the other with more than 8,700 attorneys.

I don't think there is any relationship between the Irvin case. Counsel says that the Irvin case discovery is over with. Let's suppose we set, and I hope we can, a trial every two months in the MDL. Are we ever going to get to this issue? Will the discovery of detailer information in a single case destroy the learned intermediary defense that's been alleged in every one of their cases? No, because we have to show a nationwide pattern.

We listed well in advance seven

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depositions in Florida. It's not incumbent upon us to tell them what our thinking is, what our strategy is, and by citing only a portion of the subpoena for documents doesn't really give the flavor of what we believe we have to do as plaintiffs. I point out that the only way this can be done is in an MDL. It cannot be done in State Courts on a state-by-state basis. This gives the MDL a rightful plaintiff discovery which adds weight to the efforts that we are doing here. They could dismiss cases, have cases thrown out on learned intermediary issue, because we haven't had sufficient time to take depositions, and I don't think they ought to be linked to specific cases. If it has to do with a specific case Mr. Kline is handling, they can notice those depositions and take them with the trial teams they have got.

Your Honor has preached that MDLs be open to lawyers across the country to participate, submit their hours. We have 60 lawyers in training sessions. We have had to hire two outside counsel for ethics opinions as to whether we could statementize or take

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depositions of former detailers. We have done all that work. We are ready to roll now. We are ready to give the 60 or 70 lawyers that want to work in the MDL work to do that is meaningful directed at a defense that, in all due respect, is vicious. It says that an HMD physician with ten minutes with a patient has to read a label every time something comes out and warn every patient that goes through his office, and they don't do it. They haven't done it for me. They haven't done it for anybody in this room. We never get warnings. The physicians can't read the warnings they are so long and convoluted.

This was an archaic defense that has grown into a poisonous tree, and we mean to chop it down if we are allowed. I don't see any reason why seven depositions that have been noticed in the State of Florida can't go forward and then in Ohio and Pennsylvania and Louisiana and every state. At least we need the opportunity in the MDL to take on this defense fairly and squarely for the first time in pharmaceutical litigation. That's what we

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are asking. They got plenty of lawyers. They have more lawyers than we do. We've got 60 lawyers to deal with this issue.

I respectfully ask Your Honor that we be allowed to double track as the order originally said, to notice depositions fairly in advance, and send our folks out in the field to take depositions that are germane, that are relevant, that will lead to discoverable and admissible evidence. I understand why the Defendants would like to delay it. They have been delaying it for 40 years now. The time has come to deal with the learned intermediary issue. And, Your Honor, we believe this is the case to deal with it.

JUDGE FALLON:

Let me hear from the Defendant.

MR. MARVIN:

Well, Your Honor, I think that the rhetoric here about trying to change the law of the Fifth Circuit or any other circuit on this issue is interesting. We have a hard core discovery issue to deal with here. What I hear counsel saying is we will take seven depositions in Florida. If I understand

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correctly, now we are talking about doing that in 50 states with 350 depositions. There needs to be some sort of program and priority here. You can double

track these, but we are not going to get anything else done that needs to be done in these cases. That's why it's not clear to me the relevancy of depositions of what sales reps told physicians in Florida when you have a case coming out of Ohio or other jurisdiction. What is relevant to a particular case, what may be relevant in the case is the communication of the sales reps for the prescribing physicians in that particular case. There may be some back drop for this, but I think it's, among other things, we have a real question of proportionality here about how many of these depositions are going to be taken and when they are going to be fit into the priority. We seem to be in a mode here where everything is top priority. We need all privileged documents. We need all other documents. We need 350 depositions. There is a limit to how many different things can get

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done at the same time, and that is part of the problem we are facing here.

JUDGE FALLON:

I understand the issue. I am going to allow him to go forward with the seven in Florida. I do urge, though, that counsel take a look at prioritizing the reps, just from the standpoint of making sense. It makes sense to me that some thought be given to prioritizing. But insofar as the ones in Florida, I will grant the motion to take those depositions. If it becomes a problem from the standpoint of burdensome, if it becomes a difficulty with taking depositions that have no rational basis, I will entertain a motion to do something about it. Insofar as these depositions, they seem to me to be relevant on the issues that Counsel have brought up and made in the pleadings. I am going to grant that motion. Anything further?

Thank you very much.

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REPORTER'S CERTIFICATE

I, NANCY LAPORTE, Certified Court Reporter, State of Louisiana, do hereby certify that the above-mentioned witness, after having been first duly sworn by me to testify to the truth, did testify as hereinabove set forth;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel or the parties hereto, and not in any way interested in the outcome of this matter.

NANCY LAPORTE
Certified Court Reporter
State of Louisiana